United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,356

FIRST SECURITY BANK OF UTAH, N.A.,
Ogden, Utah, *Appellant*,

v.

COMMERCIAL SECURITY BANK, Ogden, Utah, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. The principle question is whether, in view of the provisions of United States Code, Title 12, Sec. 36(c), as amended, and of the Utah Code Annotated, 1953, Sec. 7-3-6, as amended, the Comptroller of Currency may authorize Appellant to open a branch of its bank in the same, second class city, in Utah in which its main office is located, by a means other than that of acquiring an existing bank.

2. Also involved is the question of whether Appellee had the necessary standing to bring the action below.

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COMMERCIAL SECURITY BANK, Ogden, Utah, *Appellee.*

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the District Court granting the Motion for Summary Judgment filed by the appellee, Commercial Security Bank, and enjoining the Comptroller of the Currency from authorizing the establishment of a branch bank by Appellant First Security

Bank of Utah, N.A. This order was entered on December 18, 1964.[1]

The United States District Court for the District of Columbia had jurisdiction over the controversy. The Comptroller of the Currency is a duly authorized officer of the Executive Branch of the Government of the United States maintaining his official place of business in the District of Columbia and is an "Agency" within the meaning of Title 5, United States Code, Section 1001. The action arises under Title 12, United States Code, Sec. 36, as is shown by the Complaint filed herein (Joint Appendix, Page 11).

STATEMENT OF CASE

The facts are not in dispute. Appellant is a national bank with its principal office and one branch in Ogden, Utah. Appellee is a state bank with its principal office and one branch likewise in Ogden, Utah. (JA 11, 12)

Two other state banks have their main offices in Ogden, namely, the Bank of Utah and the Bank of Ben Lomand. (JA 14)

Ogden is classified as a city of the second class under the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)). (JA 14)

On June 25, 1963, the Appellant First Security Bank filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish a second branch in Ogden. On July 18, 1963, the Appellee brought the action below, seeking to enjoin the Comptroller of the Currency from approving the branch application on the ground that it would violate 12 U.S.C. §36. On June 9, 1964, the Comptroller notified Appellant that its branch application had

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[1] This Appellant and the Comptroller of the Currency took separate appeals, resulting in two cases on the docket of this Court. The Comptroller's appeal is numbered 19,257. The record is identical in both appeals.

been approved, but the court below enjoined the Comptroller from issuing the Certificate of Authority to Appellant, which was necessary before the branch could be opened. (JA 24) It is this order which is now appealed.

STATUTES

The following statutory provisions are the ones involved in this case.

I

United States Code, Title 12, Sec. 36(c), as amended, provides, in pertinent part

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and
>
> (2) At any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State Banks."

(12 U.S.C. 36(c)(1) was enacted in 1927; 12 U.S.C. 36(c)(2) was enacted in 1933.)

II

Utah Code Annotated, 1953, Sec. 7-3-6, as amended, provides, in pertinent part:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be estab-

lished in any city or town in which is located a bank or banks, state of national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

STATEMENT OF POINTS

1. The District Court erred in granting the Appellee's (Plaintiff below) Motion for Summary Judgment.

2. The District Court erred in holding that the Comptroller of the Currency did not have the statutory authority to grant a certificate to Appellant for the establishment of a new branch bank in the City of Ogden, Utah.

3. The District Court erred in holding that Appellee had standing to bring this suit.

SUMMARY OF ARGUMENT

12 U.S.C. 36(c)(1) is the statute authorizing the Comptroller of the Currency to permit Appellant to establish a branch in Ogden, Utah. It was passed six years prior to 12 U.S.C. 36(c)(2), and must be interpreted separate and apart from the latter statute. Under 12 U.S.C. 36(c)(1), the Comptroller could authorize the branch in Ogden if a state bank could establish a branch in Ogden. Under Utah law, a State bank could establish a branch in Ogden. The fact that a State bank is bound by State procedures as to the method of establishing a branch does not affect the Comptroller, and he is not bound by State laws or regulations as to method.

Even if 12 U.S.C. 36(c)(1) and 12 U.S.C. 36(c)(2) should, *arguendo*, be read together, the Comptroller still had authority to authorize a branch in Ogden for Appel-

lant because 36(c)(2) adds only a limitation as to geographical location, and not as to method, and State banks could establish branches in the location of Ogden.

The legislative history of both the 1927 Act (36 (c)(1)), and the 1933 Act (36 (c)(2)), substantiate this position.

The interpretation which the Court below places on 12 U.S.C. 36(c) puts that statute in conflict with national policy as expressed in the Federal anti-trust and banking laws.

Appellee had no standing to bring suit, being only a competitor of Appellant.

ARGUMENT

Introduction

One way of phrasing the principal issue on this appeal is whether a state bank can prevent the Comptroller of the Currency from authorizing Appellant to open a branch bank in Ogden, Utah. It should be recognized at the beginning that judicial review of an action taken by the Comptroller is limited by the Administrative Procedure Act, 5 U.S.C. § 1009. Matters decided by the Comptroller in the exercise of his discretion should not be reversed by the reviewing court unless the evidence indicates that his decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Community National Bank of Pontiac* v. *James J. Saxon*, 310 F. 2d 224, 227 (6th Cir., 1962). See also: *Adams* v. *Nagle*, 303 U.S. 532 (1938); *Apfel* v. *Mellon*, 33 F. 2d 805 (D.C. Cir., 1929), *cert. den.* 280 U.S. 585 (1929); *First Nat'l Bank* v. *Murray*, 212 F. 140 (8th Cir., 1914). In the instant case, abuse of discretion is really not an issue and the position of Appellee is that the action of the Comptroller in authorizing a branch to Appellant is not in accordance with law.

THE STATUTE AUTHORIZING THE COMPTROLLER'S ACTION

12 U.S.C. § 36(c)(1) was enacted into law in 1927. It deals with so-called "inside" branches, by which is meant branches located in the same city, town or village, as the principal office of the bank. Since it is the position of Appellee that 12 U.S.C. 36(c)(1) and 36(c)(2) should be read together as an attempt by the Congress to create exact equality between state and national banks, it should be kept in mind that the two sections were enacted some six years apart, one prior to the great depression and one during its worst stages.

When in 1927 Congress enacted 12 U.S.C. 36(c)(1), it authorized branch banking by national banks for the first time. After much debate as to the extent to which national banks should be allowed to open branches, Congress authorized only "inside branches", i.e., branches in the city, town or village in which the national bank was located. Branches for national banks outside the city where the main office was located were not authorized in 1927, even if state banks had such authorization under state law. It is clear, therefore, that in 1927 in enacting 36(c)(1), the goal of Congress was not exact, competitive equality with state branching systems. Arguments to the contrary, similar to Appellant's herein, have been made from time to time, and have been rejected by the courts. In *Rushton* v. *Michigan Nat'l Bank,* 298 Mich. 417, 299 N.W. 129 (1941), it was held that a national bank need not obtain permission from the State Bank Commission in order to establish a branch. Attempts to make regulations of a State Bank Commission applicable to national banks were also unsuccessful in *State of South Dakota* v. *The Nat'l Bank of South Dakota and First Bank Stock Corporation,* 219 F. Supp. 842. (D. South Dakota, S.D. 1963)

Indeed, 12 U.S.C. 36 (c)(1) establishes three conditions which must be met before a national bank can open a branch. They are:

(1) The Comptroller of the Currency must grant approval;

(2) The proposed location of the branch must be within the limits of the city in which the applying national bank is situated; and

(3) The establishment and operation of a branch within the city must be expressly authorized to state banks by the law of the state.

There is no dispute over (1) and (2). These conditions have been fulfilled by Appellant. There is really no dispute over (3) either, because the establishment and operation of a branch within the City of Ogden is expressly authorized to state banks by the provisions of the laws of Utah, set forth, *supra,* page 3. The first sentence of the fourth paragraph of Section 7-3-6, Utah Code, 1953, as amended, states:

> "* * * no branch bank shall be established in any city or town in which is located a bank or banks, unless the bank seeking to establish such branch shall take over an existing bank * * *".

This language makes it quite clear that a state bank is expressly authorized to establish a branch in Ogden, by acquiring an existing bank. The fact that Utah law imposes a procedural requirement, i.e., acquisition, for establishing the branch is significant only for state banks. The provisions of 12 U.S.C. 36(c)(1) do not adopt the procedural requirement of state law. The language of 36 (c)(1) is both specific and limited.

The only judicial determination of this point by a court physically located in Utah agrees completely with this position. In *Walker Bank & Trust Company* v. *James J. Saxon and the First National Bank of Logan,* 234 F. Supp.

74, 77 (D.C. District of Utah, N.D.), No. C 137-63,[2] Judge A. Sherman Christensen stated:

> "It is my opinion that under the laws of the State of Utah as declared by Section 7-3-6, Utah Code Annotated, 1953, and interpreted by Walker Bank & Trust Company v. Taylor, 390 P. 2d 592, supra, the establishment and operation of new branches within the limits of the city, town or village in which a State bank is situated, are 'expressly authorized' to State banks within the contemplation of Section 36(c)(1), Title 12, U.S.C., and that therefore the Comptroller had power to authorize the establishment of a branch by the defendant National Banking Association in the City of Logan."

Judge Christensen set forth the reasons for arriving at his decision, in detail, and they are equally applicable to the present case. It was an "undeniable fact", he felt, that there was the necessary express authority under Utah Law, and (at P. 78, f.n. 8):

> "That there are conditions for such establishment, including the consent of the bank commissioner, capitalization requirements and, in certain cities and under specified conditions, the acquisition of another bank, does not change the 'express authority' into a lack of authority on the part of State banks or a lack of statutory expression of such authority, and does not add to the Federal statute a requirement that compliance be made by National banks with all State conditions."

A national bank, in other words, is no more bound by the procedural requirement of acquiring an existing bank than it is by the state procedural requirements as to capitalization. As long as a state bank is expressly authorized to open a branch in the City of Ogden, Utah,

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[2] Walker Bank & Trust Company is prosecuting an appeal to the Tenth Circuit Court of Appeals from Judge Christensen's decision. The case has been briefed but has not been reached for oral argument at the time of filing this brief.

albeit under some State-imposed conditions, the Appellant National bank may under Federal law be authorized by the Comptroller to open a branch in Ogden, and the National Bank is not bound by the State conditions as to capitalization, means, etc., including the condition as to acquisition.

In holding for the Appellee, the District Court, in the instant case, relied upon the decision in *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, affirmed *per curiam*, 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960). This reliance, it is respectfully submitted, was completely misplaced for the following reasons.

First and foremost, the *Gidney* case involved an "outside" branch, so the statute in question was 36(c)(2), not, as in the present case, 36(c)(1). As we have seen, 36(c)(2) was passed six years after 36(c)(1), and its legislative history, which the Court found persuasive in *Gidney*, was not the same legislative history before the Court in the instant case.

Legislative History of 12 U.S.C. 36(c)(1)

A brief, pertinent summary of the legislative history of 36(c)(1), the 1927 McFadden Act, is as follows:

Subsection 36(c)(1) originated in H.R. 8887 which was passed by the House of Representatives in 1925. Since it failed of passage in the Senate during the closing days of the session, it was again introduced as H.R. 2 in 1926 (See remarks of Congressman McFadden, 68 Cong. Rec. 5815, 69th Cong., 2nd Session, 1926). In submitting the bill to the whole House, Mr. McFadden stated that: ". . . The branch banking policy of the bill [is to] confine all branch banking within the national banking system to city limits and to prohibit national banks from establishing any branches in states which prohibit state banks from exercising this power." H.R. Rep. No. 83, 69th Cong., 1st Sess. 4 (1926).

This same policy was recognized in the Senate Committee on Banking and Currency in its report to the Senate. It is stated therein that:

> ". . . under the House bill national banks would be permitted to keep the branches they now have, branch banking would be permitted for national banks in cities . . . where State banks can have branches, and national banks would be denied the right to have branches at all in any State which denied to State banks the right to have branches. S. Rept. 473, 69th Cong., 1st Sess. 8.
>
> ". . . your committee is of the opinion that the bill is sufficiently restrictive when it declares unlawful the establishment of branches by national banks in any city in which the State banks are denied that right by State law and properly permissive when it permits national and State member banks to have branches in any city in which it is lawful for State banks to have branches." S. Rept. 473, 69th Cong., 1st Sess. 10.

It is quite clear that Subsection (c)(1) was intended to restrict branches of national banks to the city in which the bank is located and to those states which allowed branching. This was stated once again by Congressman McFadden, the author of the bill, in comments made by him on the floor of the House after the bill was enacted and signed. 68 Cong. Rec. 5716, 69th Cong. 2nd Sess. (1927). He stated that:

> "This amendment repeals every provision of the law with which it is in conflict and outlines clearly the conditions under which a national bank may have a legal branch or branches hereafter. This amendment establishes a national branch banking policy. Three conditions under which national banks may have branches are:
>
> "First. The national bank must be located in a State which by law permits State banks to have branches. There must be a positive affirmative statutory authorization of branch bank territory in which national banks will be permitted to have branches.

> "Second. The national bank must be located in a city having a population of 25,000 and over before any application for a branch or branches can be considered.
>
> "Third. The branch or branches must be located within the limits of the city, town or village in which the parent bank is located. Although the word 'corporate' was inadvertently omitted in the Senate amendment in connection with the words 'limits of the city' to designate the territory to which branch banking must be confined, the debates in both houses of Congress indicate clearly that branch banking must be confined to the corporate limits of the city, town or village in which the parent bank is located, and not permitted in contiguous territory, or in what may be termed the social, economic or metropolitan area surrounding or adjacent to the city, town or village. If there is any doubt on this question, the legislative intent must govern, and it was clearly the purpose of Congress to forbid the establishment of new branches outside of corporate limits."

It is evident, then, that the purpose of Subsection (c)(1) was to limit branches of national banks to the limits of the city in which the bank is located and to prevent national banks from opening branches in states which did not authorize branch banking. There was no other purpose, either expressed or implied.

Although minor amendments have been made to Subsection (c)(1) since its enactment, the purpose and substance have not been changed.

The conclusion to be drawn, it is respectfully submitted, is that neither the plain wording of 12 U.S.C. 36(c)(1) nor its legislative history, sustain the position that the Comptroller is bound by state procedural requirements or that there was an intent of Congress to establish exact equality, at least with respect to "inside branches". The requirement that actually was established, and which the legislative history of the 1927 Act makes clear, namely, the

need of express authorization for branches for state banks, is met, admittedly, in the present case.

Whether the Court in *Gidney* correctly interpreted the legislative history before it, i.e., of 12 U.S.C. 36(c)(2), therefore, and indeed whether its decision in that case was correct, has little or no bearing on the present case, which involves a different statute and a different issue.

Gidney Case Involved Different Issue

A second reason why the *Gidney* case should not have been considered as controlling in the present case is that it was a completely different issue which was involved. The issue in *Gidney* was whether or not the area where the proposed branch was to be located was a "village" within the meaning of state law. When the District Court in *Gidney* therefore, stated that:

> "[it was] the apparent purpose of Congress to have exactly the same standards—state law—apply to the establishment of state bank branches.";

it must be remembered:

(1) A different issue was involved;

(2) A different statute with a different purpose and different legislative history was involved; and

(3) In the instant case, if the State law is applied to both state and national banks, then the Comptroller's decision to authorize a branch to Appellant is correct because, under State law, a state bank is authorized to open a branch in Ogden, Utah.

Appellant submits therefore, that it is clear that the McFadden Act of 1927 was intended to remove one of the competitive disadvantages then facing national banks. Congress did this by authorizing national banks to establish branches in their home cities only, Provided the Comptroller of the Currency approved and Provided Further

that the particular State involved permitted State-chartered banks to have branches. Competitive equality between national and state banks with regard to branches was certainly not enacted into law because, unlike some state branches, national branches were expressly limited to home cities, and there is nothing in the legislative history of the 1927 Act to indicate that competitive equality was intended. Both in its reliance upon the *Gidney* case, therefore, and in arriving at a similar conclusion irrespective of *Gidney*, it is respectfully submitted that the Court below erred in construing the law, and in granting the injunction.

Legislative History of 12 U.S.C. 36(c)(2)

The McFadden Act of 1927 was enacted before the great 1929 market crash, and the panic and depression following that crash led in 1933 to the enactment of the Banking Act of 1933, also known as the Glass-Steagall Act (Act of June 16, 1933, 48 Stat. 162). It was as a part of this Act that the present 12 U.S.C. 36(c)(2) was enacted into law. Moreover, a review of the legislative history of this Act will show that there is nothing in it to support the conclusion of the Court below that 36(c)(1) and 36(c)(2) should be read together as an attempt to bring about exact competitive equality.

When the 1933 Act was before it, the Senate Banking and Currency Committee proposed to authorize national banks to establish branches "not merely in the towns and cities in which they are located, but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws." (S. Rept. No. 584, 72d Cong. 1st Sess., p. 11, (1932). Under certain conditions, in fact, branch banking across state lines would be permitted, provided the usual business of the bank extended across state lines, as it often did where large cities were located near state lines. State banks, of course, could

not have branches across state lines, so the bill certainly involved no concept of competitive equality at this point.

This bill of Senator Glass reached the floor of the Senate in January of 1933, where Senator Glass made a statement on the floor that he preferred a provision which would authorize national banks to establish banking branches irrespective of state law, but rather than have the whole Banking Act fail of enactment over this, he would accept provisions which would, "confine branch banking to those States which permit it to State Banks". 76 Cong. Rec. 1997. This concession by Senator Glass was adopted by an amendment to the Act introduced by Senator Bratton, which Amendment read:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized for State banks by the law of the State in question." 70 Cong. Rec. 2079

To this amendment, the following clause was then added:

> "and under restrictions as to location imposed by the law of the State on State banks." 76 Cong. Rec. 2079.

In this form, the Amendment was agreed to. 76 Cong. Rec. 2208.

The Senate passed a bill containing this provision, and when the House failed to act during that session, passed the same provision in its next session. S. Rept. No. 77, 73rd Cong. 1st Sess., pp. 11, 16-17 (1933). The Senate Report in this later session contained the comment:

> "The branches so established are also to be subject to the restrictions as to *location* imposed by the law of State upon State banks * * *." S. Rept. No. 77, 73rd Cong., 1st Sess., P. 11 (1933) (Emphasis added).

The Conference Committee adopted this language of the Senate bill, and with minor changes in language, it became what is today 12 U.S.C. 36(c)(2).

It was when the House Conferees were explaining the Conference approved bill to the members of the House that the phrase "compete on equal terms" was used in connection with state and national banks. See 77 Cong. Rec. 5896. It was used, however, only with respect to the 1933 Act dealing with outside branches, and not with respect to the 1927 Act dealing with inside branches. In addition, it applied only to location.

Judge Christensen, it is submitted, was clearly correct in concluding that 12 U.S.C. 36(c)(1), dealing with inside branches, along with its legislative history, is distinct from 12 U.S.C. 36(c)(2), and that the two provisions are to be interpreted separately. Conversely, Appellant submits that the conclusion of the Court below in the present case in this respect was clearly erroneous in holding that:

> "In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner."

Since the Court below concluded thus, it felt bound by this Court's affirmance in *Commercial State Bank of Roseville* v. *Gidney, supra,* but, as we have seen, that case involved both an issue and a statutory provision different from the present case.

Even If 12 U.S.C. 36(c)(2) Applied to the Instant Case, the Comptroller Is Authorized to Grant a Branch to This Appellant.

While, in view of the narrow basis for the Comptroller's authority discussed above and limited to 12 U.S.C. 36(c)(1) the Court need not reach this point, yet it remains true that even if, *arguendo,* all the limitations on the Comptroller contained in both 12 U.S.C. 36(c)(1) and 36(c)(2)

were applicable in this case, the Comptroller would still have the authority to grant to Appellant permission to establish a branch in Ogden.

The clause in 36(c)(2) "And subject to the restrictions as to location imposed by the law of the State on State banks" is really the keystone on which the Appellee and the Court below base their entire position. They construe 12 U.S.C. 36(c) and the Utah statute together as meaning that since a state bank can open a branch in the location of Ogden only by acquisition, then a national bank can open a branch there only by acquisition. In so doing they expand the concept of "location" so it includes both "method and location" and then impose this double restriction on national banks though Congress had imposed but a single restriction. They then justify this Janus, which they have created, by a misplaced reliance upon what they erroneously consider to have been a Congressional intent to create exact quality between the two banking systems.

The fact is, however, that not even 36(c)(2), assuming *arguendo,* that it was applicable, would place this restriction upon the Comptroller. The restriction as to location contained in 36(c)(2) obviously refers to geography, to the "where" of a new branch. The restriction in the Utah Code limiting new state bank branches to those established through acquisition refers not to geography but to method, not to the "where" but to the "how". These Utah limitations are not imposed upon the Comptroller by any provision of any law, and he is free of them because the actions of the Comptroller of the Currency are subject to state restrictions only when and to the extent that Congress has expressly provided. *Merchantile National Bank* v. *C. H. Langdeau,* 83 S. Ct. 520 (1963); *Van Reed* v. *Peoples' Nat. Bank of Lebanon,* 198 U.S. 554, 557 (1905). See also *Franklin National Bank* v. *New York,* 347 U.S. 383 (1954); *Davis* v. *Elmira Savings Bank,* 161 U.S. 275 (1896); *Farmers' & Mechanics' National Bank* v. *Dearing,* 91 U.S. 29 (1875); *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409 (1874).

The extent to which Congress has expressly legislated in 36(c)(2) is limited to location. There is no question that a state bank can establish a branch in the location of Ogden. This being so the Comptroller can authorize a national bank to do likewise. If the state chooses to impose additional conditions upon state banks, such as method (acquisition) in this case, and perhaps minimum capitalization requirements in another case, it surely may do so, but Congress has not said in 12 U.S.C. 36(c)(2) or anywhere else that these additional requirements shall also be applicable to the Comptroller of the Currency and national banks, and, it is respectfully submitted, they are not.

The determination by the Comptroller that 36(c)(2)'s limitation as to location does not include method or means is clearly entitled to great weight as made by the agency charged with the administration of the statute. *Federal Trade Commission* v. *Mandel,* 359 U.S. 385, 391; *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 139-140; *United States* v. *American Trucking Ass'n.,* 310 U.S. 534, 549; *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315. In addition to the weight to be given to the Comptroller's determination, however, there is the clear language of the statute itself, which in no way indicates that state procedural requirements as to the method of establishing the branch are to be binding upon the Comptroller.

It should be kept in mind that in the present case, the Appellant sought to establish a branch in the same city where its main office was located; that 12 U.S.C. 36(c)(1) rather than (2) therefore applied; and that (1) does not even have the "location" requirement found in (2). It is only because the Court below found that (1) and (2) should be construed together that it is pointed out here that, even under (2), the Comptroller would be authorized to permit appellant to establish a branch in Ogden.

PUBLIC POLICY

The Utah statute obviously favors and encourages bank mergers and acquisitions, even to the point of monopoly in some cases. In a city where there are but two banks,

both state, the only way one of the banks could open a branch would be to acquire the other one. This, of course, is directly contrary to our national policy with respect to competition, as indicated by Section 7 of the Clayton Act,[3] by the Sherman Act,[4] by the Bank Holding Act of 1956,[5] and elsewhere. These laws are designed to foster competition and to prevent monopolies, oligopolies and the foreclosure of markets. To construe 12 U.S.C. 36(c) as Appellee seeks, would be to promote the ability of states to run counter to national policy on competition,[6] and to allow states to establish methods of establishing branches, anti-competitive in nature, yet binding upon the Federal Government. We believe that such a result should not be reached by this Court unless absolutely required by the statute, and, as has been pointed out above, the statute actually calls for the opposite.

STANDING

Since the Appellee has no statutory or other right to be free of competition, Appellant believes it lacked standing to bring this action. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U.S. 118; *Pennsylvania Railroad Co.* v. *Dillon,* 335 F. 2d 292 (D.C. Cir. 1964), *cert. den.* 379 U.S. 945. In *Commercial State Bank of Roseville* v. *Gidney,* 174 F. Supp. 770, 780, the District Court held that a competitor of the Bank to whom the Comptroller would authorize a branch *did* have standing, however, and this opinion of the District Court was affirmed by this Court *per curiam, supra.* Appellant believes that the *per curiam* affirmation of the District Court gave appellate sanction to new and erroneous law with respect to the standing of competitors, and Appellant now requests this Honorable Court to review and repudiate *Gidney* with respect to the holding of that case on standing.

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[3] 15 U.S.C. 18.

[4] 15 U.S.C. 1, 2.

[5] 12 U.S.C. 1842 (c).

[6] See *United States* v. *Philadelphia National Bank,* 374 U.S. 321.

CONCLUSION

Because:

(1) State banks are expressly authorized to establish branches in Ogden; and

(2) 12 U.S.C. 36(c)(1), the applicable statute, therefore, allows the Comptroller to authorize branches of national banks in Ogden; and

(3) This view is fully supported in the legislative history, which does not indicate exact competitive equality between national and state banks to have been the intent of Congress; and

(4) Even if 12 U.S.C. 36(c)(1) and (2), enacted six years apart, are to be construed together, the requirement of location does not extend to method and does not prevent the Comptroller from authorizing a branch in this case; and

(5) The interpretation of the Court below is contrary to national policy on competition; and

(6) Appellee should have had no standing to bring the action below;

this Court should reverse the decision of the Court below.

Respectfully submitted,

JOHN J. WILSON
CHARLES J. STEELE
815 15th Street, N.W.
Washington, D. C. 20005

Attorneys for Appellant, First Security Bank of Utah, N.A.

Of Counsel:

WHITEFORD, HART, CARMODY & WILSON

JOINT APPENDIX

JOINT APPENDIX

District Court

Docket Entries

DOCKET 1815-63

1963

July 18—Summons, copies (3) and copies (3) of Complaint issued ser. 7-18; Ab ser. 7-19; DA ser. 7-19.

July 18—Motion of Pltff. for Temporary Restraining Order, Affidavits (2); Exhibits A & B; P & A.—filed.

July 18—Motion of Pltff. for Preliminary Injunction; P & A—filed.

July 19—Injunction undertaking of James F. Bell, attorney for Pltff. in the sum of One Hundred Dollars—filed.

July 19—Temporary Restraining Order; $100.00 undertaking; issued at 10:00 A.M. (N) ser. 7-19; DA ser. 7-19; AG ser. 7-20, Curran, J.

July 19—Order fixing July 29, 1963 at 10:00 AM. for hearing on Motion for Preliminary Injunction (N) Curran, J.

July 26—Motion of Pltff. for postponement of date of hearing of motion for preliminary injunction; Exhibit A—filed.

November 8—Consent Order extending time for deft. to plead to and including December 1, 1963. (N) Holtzoff, J.

December 2—Consent Order extending time for deft. to plead to and including January 3, 1964 (N) McGarraghy, J.

1964

January 2—Consent Order extending time for deft. to plead to and including February 3, 1964 (N) Holtzoff, J.

February 4—Consent order extending deft.'s time to plead or otherwise defend to March 3, 1964 (N).

March 5—Order extending time to answer to and including April 3, 1964 (N). Keech, J.

April 13—Consent order extending deft.'s time to answer to and including May 4, 1964 (N) Curran, J.

May 27—Consent order extending time to answer to and including July 1, 1964 (N) Curran, J.

June 26—Motion of First Security Bank of Utah, N.A., for leave to intervene; c/m 7-25-63; points and authorities; Exhibit; Deposit by John J. Wilson, $5.00; appearance of Whiteford, Hart, Carmody & Wilson (815-15th Street, N.W.), as attorneys for Applicant; M.C. 6-26-64. —filed.

June 26—Motion of deft. to dismiss; c/m 6-26-64; Memorandum; M.C. 6-26-64.—Filed.

June 26—Motion of intervenor for summary judgment; c/m 6-25-64; Memorandum M.C. 6-30-64—filed.

June 26—Order granting Motion of First Security Bank of Utah, N.A., to intervene as party defendant (N) Curran, J.

July 6—Cross Motion of Pltff. for summary judgment; Statement of material facts; points and authorities in support of Cross Motion and in opposition to deft.'s Motions; c/m 7-6-64; M.C. 7-6-64—filed.

July 17—Statement of material facts in support of motion of deft. No. 2 for summary judgment; c/mailing—filed.

August 13—Opposition of deft. No. 2 to pltff.'s Motion for Summary Judgment. c/m 8-12-64.

October 5—Supplemental Memorandum of pltff. in support of Cross Motion for summary judgment; Appendix A and B; ser/ack. 10/5/64—filed.

October 7—Motion to dismiss; Motion for summary judgment by intervenor and Cross Motion for summary judgment by intervenor and Cross Motion for summary judgment argued and taken under advisement. (Rep. Roger E. Frye) Walsh, J.

October 7—Memorandum of deft. James J. Saxon—filed.

October 19—Appearance Brian C. Elmer as attorney for pltff.—filed.

December 18—Memorandum and Order denying motion of defendant to dismiss; denying motion of Intervenor-Defendant for summary judgment; and granting Motion of pltff. for summary judgment; deft. is enjoined from authorizing the establishment of the branch bank by the Intervenor-Defendant, (N) Micro. 12/21/64 Walsh, J.

1965

February 12—Notice of Appeal by Intervenor from Order 12/18/64; copies to James Bell, U.S. Attorney and Attorney General; Deposit $5.00 by C. Steele—filed.

February 15—Appearance Richard S. Beatty, as Attorney for deft No. 1.—filed.

February 15—Notice of appeal by Deft. no. 1 from Order 12/18/64; copy to James Bell and Whiteford, Hart, Carmody & Wilson.

February 17—Cost bond on appeal by pltff. in sum of $250.00 with The Travelers Indemnity Company—approved. "fiat" Matthews, J.

March 17—Order extending time for deft. no. 1 to file and docket record on appeal to fifty (50) days to and including May 13, 1965 (N) Walsh, J.

March 19—Order extending time for Intervenor, First Security Bank of Utah, N.A. to file and docket record on appeal for 50 days, to and including May 13, 1965 (N) Matthews, J.

May 12—Record on appeal delivered to USCA. Deposit by C. J. Steele $1.55—filed.

May 12—Receipt from USCA for original papers—filed.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1815-63

COMMERCIAL SECURITY BANK, Ogden, Utah, *Plaintiff*,

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Defendant*.

Motion for Temporary Restraining Order

Now comes the plaintiff by its undersigned attorney and moves this Court as follows:

To grant forthwith and without notice a temporary restraining order restraining and enjoining the defendant or his agents from issuing to the First Security Bank of Utah, N.A. a Certificate or any other writing approving and authorizing the establishment and operation by the said First Security Bank of Utah, N.A. of a branch bank at a location on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, pending a hearing on, and disposition of plaintiff's Motion for Preliminary Injunction filed herein on July 18, 1963; and for cause refers to the Affidavits attached hereto, and made a part hereof, and to the Statement of Points and Authorities in support of this Motion, and further refers to the Complaint Requesting Declaratory Judgment and Injunctive Orders and to the Motion for Preliminary Injunction, both filed herein on July 18, 1963.

JAMES F. BELL
James F. Bell
Attorney for Plaintiff
1001 Connecticut Avenue
Washington 6, D. C.
Telephone: EX 3-5333

NEIL R. OLMSTEAD
Ogden, Utah
Of Counsel

Affidavit

STATE OF UTAH
COUNTY OF WEBER ss

Robert G. Hemingway, being first duly sworn, on oath deposes and says:

He is President of Commercial Security Bank, plaintiff in the above entitled action, and as such he makes and submits this affidavit for and on behalf of said Bank in support of it's motion for a temporary restraining order and preliminary injunction therein.

Commercial Security Bank is a banking corporation organized and existing under the laws of Utah. It's principal office and place of business is at 2491 Washington Boulevard, within the corporate limits of Ogden, Utah, and it has a branch office within the corporate limits of said Ogden, Utah, located at 458 25th Street. By the laws of Utah it is restricted from establishing any additional branch in the said City of Ogden.

Plaintiff, Commercial Security Bank, has customers and depositors who reside or have their places of business in the vicinity of the location of the proposed branch of the First Security Bank of Utah, N. A., and affiant verily believes,

1. As of July 1, 1963, the number of depositors of plaintiff Bank who reside within a one mile radius of the location of the proposed branch of First Security Bank of Utah, N. A. exceeds fifteen percent of plaintiff's total depositors.

2. The deposits of plaintiff's depositors who reside within such one mile radius exceeds fifteen percent of all of plaintiff's demand deposits.

3. The total of loans made by plaintiff to borrowers residing within such one mile radius exceeds fifteen percent of all loans made by plaintiff.

A field examination of the application for the proposed branch was ordered by the Comptroller and such examination was completed today, July 16, 1963. Affiant is informed and believes that a report of such field examination will be immediately forwarded by the Examiner to his Regional Office in Denver, Colorado, and from there to the Comptroller of the Currency in Washington, D. C., and such report will be received by the Comptroller within a period of five to seven days from this date. Affiant is further informed that it is the policy of the Comptroller to act upon applications for branch banks immediately upon receipt of the Examiner's report, and affiant believes that the Comptroller will act upon the application of First Security Bank of Utah, N. A. for its proposed branch referred to above immediately upon receipt of the Examiner's report thereon.

Should the Comptroller of the Currency authorize the First Security Bank of Utah, N. A., which is the largest bank in the City of Ogden with combined resources in excess of Three Hundred Sixty Million ($360,000,000.00) Dollars, to open a branch bank in the area it proposes, plaintiff will necessarily suffer severe loss of loans, deposits and other business and will sustain damage to it's business and profits of upwards of Fifty Thousand ($50,000.00) Dollars a year. Additionally, if the Comptroller of the Currency is permitted to issue his Certificate of Authority to First Security Bank of Utah, N. A. to open and operate the said branch, plaintiff would have no adequate remedy at law.

Dated July 16, 1963.

ROBERT G. HEMINGWAY

Subscribed and sworn to before me this 16th day of July, 1963.

NEIL R. OLMSTEAD
Notary Public
Residing at Ogden, Utah

My commission expires:
March 24, 1967.

Affidavit in Support of Temporary Restraining Order

CITY OF WASHINGTON
DISTRICT OF COLUMBIA SS:

James F. Bell, being duly sworn, deposes and states:

1. That I am an attorney duly admitted to practice before the United States District Court for the District of Columbia.

2. On this day, July 18, 1963, at the request and by the direction of the plaintiff, Commercial Security Bank of Ogden, Utah, I have filed herein a Complaint for Declaratory Judgment and Injunctive Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation by the First Security Bank of Utah, N. A. (a national banking association) of a branch bank on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, and at the same time I filed a Motion for Preliminary Injunction to restrain defendant from issuing said Certificate during the pendency of that Complaint.

3. The basis of the aforesaid Complaint and Motion is that defendant is prohibited by Title 12 United States Code, Section 36, from approving and authorizing a branch office of the aforesaid First Security Bank of Utah, N. A. at the location above-described.

4. As stated in the Affidavit of Mr. Robert G. Hemingway, President of Commercial Security Bank, the field investigation on the application of the First Security Bank of Utah, N. A. for a branch at the above location has been completed and the application, with the report thereon, will be at the Comptroller's office awaiting decision early next week.

5. It has been the announced policy of the defendant to give expeditious action to all applications of National banks for branches. I verily believe, therefore, that the defendant may issue a certificate of authority to the First Security Bank of Utah, N. A. before this Court has an opportunity

to hear, or to act upon, plaintiff's pending Motion for a Preliminary Injunction.

6. The Complaint and the Motion for Preliminary Injunction herein allege, and I verily believe, that after the defendant issues his Certificate to the First Security Bank of Utah, plaintiff will have no legal remedy to prevent the operation of such branch office by said Bank at the allegedly illegal location on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

7. If defendant is not restrained immediately from issuing his Certificate of approval and authority to the First Security Bank of Utah, N. A. of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, the said Bank will, as soon as it receives defendant's certificate, open for business and commence operation of a branch office at the allegedly illegal location above-described, to the irreparable loss, injury and damage to the banking business of the plaintiff, and that the issuance by defendant of his Certificate will deprive the plaintiff of any legal remedy against such illegal action of the defendant.

JAMES F. BELL

CITY OF WASHINGTON
DISTRICT OF COLUMBIA ss:

Subscribed and sworn to before me this 18th day of July, 1963.

s/ MARY MARTICELLI
Notary Public

My Commission Expires Oct. 31, 1966.
(SEAL)

Motion for Preliminary Injunction

Comes now the plaintiff herein and respectfully moves this Court to grant a preliminary injunction restraining the defendant from issuing his Certificate approving and

authorizing the establishment and operation by the First Security Bank of Utah, N. A., of a branch on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah.

In support of such motion plaintiff states to the Court as follows:

1. Plaintiff is filing, simultaneously with this motion, a Complaint for Declaratory Judgment and Injunctive Orders against defendant requesting—

(a) A determination that the establishment and operation by the First Security Bank of Utah, N. A., (a national banking association) of a branch bank at the location above described would be a violation of Title 12 United States Code, Section 36 (National Banking Act);

(b) Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation of such branch bank; and

(c) Such other and further relief as the facts and circumstances may require.

2. Plaintiff Commercial Security Bank, does now operate, and since July 30, 1925 has operated, a bank in Ogden, Utah, which bank was duly established under the laws of the State of Utah. In addition to its principal office it also operates a branch office in that city.

3. Title 12 United States Code, Section 36(c), authorizes the establishment and operation of branches by National Banks, with the approval of the Comptroller of the Currency, at locations where State banks are expressly permitted by State law to establish and operate branches. The law of the State of Utah prohibits the establishment and operation of branches of State banks in a city or town in which is located any bank regularly transacting a banking business, with certain exceptions not here applicable relating to cities of the "first class." Utah Code Ann. Tit. 7, Chap. 3, Sect. 6. As the proposed location for the proposed

branch of the First Security Bank of Utah, N. A. is within the City of Ogden where there are presently three banks regularly transacting a banking business (Plaintiff, the Bank of Utah, and the Bank of Ben Lomand), the approval of the establishment of such branch by the defendant herein would be illegal.

4. Plaintiff further alleges, upon information and belief, that despite the prohibition of law described in paragraph 3 above, a field investigation by a National Bank Examiner of the application of the First Security Bank of Utah, N. A. for a branch has been completed, and that the said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank at the location described in its pending application, all in contravention of Title 12 United States Code, Section 36.

5. The issuance of the aforesaid Certificate by the defendant to the First Security Bank of Utah, N. A. would constitute conclusive legal authority of said bank to establish and operate its proposed branch at the location hereinbefore described, and such action could not be challenged by plaintiff in any subsequent proceeding. Therefore, the plaintiff has no adequate remedy at law.

6. Plaintiff further alleges that the issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The First Security Bank of Utah, N. A. is a much larger bank than is plaintiff. The location at which it proposes to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden. A substantial number of the customers, depositors, and borrowers of the plaintiff are located in the vicinity of the proposed branch. If the First Security Bank of Utah, N. A., a bank many times larger than plaintiff, were allowed

to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury of the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

WHEREFORE, plaintiff prays the Court to hear this Motion promptly and to issue its preliminary injunction restraining defendant from issuing his Certificate above described pending the hearing and determination of the complaint herein filed.

JAMES F. BELL
James F. Bell
Attorney for Plaintiff
1001 Connecticut Avenue
Washington 6, D. C.
Telephone: EX 3-5333

NEIL R. OLMSTEAD
Ogden, Utah
Of Counsel

Complaint for Declaratory Judgment and Injunctive Order

1. Plaintiff is a banking corporation organized under the laws of the State of Utah. Defendant is a duly constituted officer of the Executive Branch of the Government of the United States maintaining his official place of business in the District of Columbia and is an "agency" of the said Government within the meaning of Title 5 United States Code, Section 1001.

This action arises under Section 36 of Title 12 of the United States Code, commonly referred to as the National Bank Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah, where it has a large investment in capital, property, equipment and goodwill, irreparable damage to which is threatened by certain action of the defendant described hereinafter. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

This is a proceeding (1) for a declaratory judgment that the issuance by the defendant Comptroller of the Currency of his Certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N. A., of Ogden, Utah, of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, would constitute a violation of Title 12 United States Code, Section 36, and (2) to enjoin the defendant Comptroller of the Currency from issuing to the First Security Bank of Utah, N. A. his Certificate of Authority for the establishment and operation of a branch bank on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

2. Plaintiff is a state bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It maintains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the authority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah.

3. Upon information and belief, on or about June 25, 1963, the First Security Bank of Utah, N. A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish and operate a branch bank on Harrison Blvd., between 30th and 36th Streets, in Ogden, Utah.

4. The First Security Bank of Utah, N. A., is a national banking association chartered by the Comptroller of the Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office.

5. The approval and authorization by the defendant Comptroller of the Currency of the establishment and operation of a branch bank at the designated location by the

First Security Bank of Utah, N. A. is prohibited by Title 12 United States Code, Section 36(c). Title 12 United States Code, Section 36 provides in part as follows:

> "The conditions upon which a national banking association may . . . establish and operate a branch or branches are the following:
>
> • • • •
>
> "(c) A national banking association may, *with the approval of the Comptroller of the Currency,* establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . ." (Emphasis supplied)

Under the foregoing provisions of Federal law a national banking association is accorded the right to establish and operate a branch with the approval of the Comptroller of the Currency only at such locations as the statute law of the State specifically authorizes State banks to establish and operate branches.

6. The statute law of the State of Utah, Utah Code Ann. Title 7, Chap. 3, Sect. 6 (1953, as amended), prohibits branches in any city or town in which is located any bank regularly transacting a customary banking business, with certain exceptions not here applicable relating to cities of the "first class":

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. . . ."

A city of the "first class" is defined under the statute law of Utah as one with a population in excess of 90,000 persons, while a city of the "second class" is defined as one with more than 30,000 and less than 90,000, persons. Utah Code Ann. Title 10, Chap. 1, Sect. 1, (1953 as amended). The City of Ogden is a city of the "second class".

7. The designated location of the proposed branch of the First Security Bank of Utah, N. A. is on Harrison Blvd., between 30th and 36th Streets, in the City of Ogden, Utah. There are three other banks regularly transacting a banking business in the City of Ogden, Utah. Plaintiff, as stated above, has both its main office and one branch in the City of Ogden. Two other banks also have their main offices located in the City of Ogden: the Bank of Utah, and the Bank of Ben Lomand.

8. Plaintiff alleges on the basis of the above-quoted provisions of the National Bank Act and of the statute law of Utah, that the establishment and operation of a branch of the First Security Bank of Utah, N. A. in the City of Ogden is prohibited because there are three other banks regularly transacting a customary banking business in said City. Accordingly, the issuance by the defendant of his Certificate approving and authorizing such proposed branch at the designated location would be illegal and in violation of Title 12 United States Code, Section 36.

9. Plaintiff alleges upon information and belief that, despite the patent prohibition of law described above, the field investigation of the application of the First Security Bank of Utah, N. A. for a branch by a National Bank Examiner has been completed, and that said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice of intention to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank at the loca-

tion described in its pending application, all in contravention of Title 12 United States Code, Section 36.

10. Plaintiff further alleges that the issuance by defendant of his Certificate to the First Security Bank of Utah, N. A. will confer upon said Bank conclusive legal authority to establish and operate a branch in the vicinity of the location described therein; that under the precedent of prior judicial decisions the plaintiff may not challenge the validity of the said Certificate in a proceeding against the said Bank; and that plaintiff therefore has no adequate remedy at law.

11. Plaintiff further alleges that the unlawful issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The location at which it is proposed to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden, and a substantial number of plaintiff's customers, depositors, and borrowers are located in the vicinity of the proposed branch. Accordingly, if the First Security Bank of Utah, N. A., a bank which is many times larger than is plaintiff, were allowed to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury of the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

WHEREFORE, plaintiff prays:

1. That the court enter a judgment declaring and adjudging that the defendant is prohibited by Title 12 United States Code, Section 36, from issuing a Certificate of Authority authorizing the First Security Bank of Utah, N. A. to establish and operate a branch on Harrison Blvd., between 30th and 36th Streets in Ogden, Utah.

2. That the court enter its order enjoining the defendant from issuing a Certificate of Authority authorizing the First Security Bank of Utah, N. A. to establish and operate a branch on Harrison Blvd., between 30th and 36th Streets in Ogden, Utah.

3. That the court, pending the final determination of this cause issue a preliminary injunction, restraining and enjoining defendant in the aforesaid manner and form.

4. That, pending the issuance of the aforesaid preliminary injunction, the court issue forthwith a temporary restraining order restraining and enjoining defendant in the aforesaid manner and form.

5. That the court grant plaintiff such other and further relief as may be just and proper.

JAMES F. BELL
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Telephone: EX 3-5333

NEIL R. OLMSTEAD
Ogden, Utah

Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 1815-63

COMMERCIAL SECURITY BANK, Ogden, Utah, *Plaintiff*,

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Defendant*.

and

FIRST SECURITY BANK OF UTAH, N.A., Ogden, Utah
Applicant for Intervention

Motion for Leave to Intervene

Comes now the First Security Bank of Utah, N.A., a banking corporation organized and existing under and by virtue of the laws of the United States of America, Ogden, Utah, through its undersigned attorneys, and moves the Court for leave to intervene in the above-captioned civil action as a party defendant, and to move or plead in its own behalf and oppose motions of the plaintiff, within the time allowed the defendant Saxon to do the same.

Applicant is the same First Security Bank of Utah, N.A., frequently referred to in the complaint and in the plaintiff's other papers filed herein; and seeks to intervene because the representation of its interest by the defendant Saxon may be inadequate and applicant may be bound by a judgment in this action; and because applicant's defense and the main action have questions of law and of fact in common.

WHITEFORD, HART, CARMODY & WILSON

By JOHN J. WILSON
Address: 815 - 15th Street, N.W.
Washington 5, D. C.

Attorneys for Applicant for Intervention.

Order Granting Intervention as Party Defendant

Upon consideration of the motion of applicant, First Security Bank of Utah, N.A., for leave to intervene herein as a party defendant, and it appearing to the Court that applicant is entitled to intervene pursuant to the provisions of Rule 24 F.R.Civ.P., and it further appearing that the parties plaintiff and defendant do not oppose such motion, it is, by the Court, this 26th day of July, 1963

ORDERED and ADJUDGED, that said motion to intervene be and it is hereby granted; and that the intervenor may

move or plead in its own behalf and oppose motions of the plaintiff, within the time allowed the defendant Saxon to do the same; and it is further

ORDERED and ADJUDGED, that the intervenor, for good cause shown, is excused from the provision of Rule 24(c) requiring its motion to be accompanied by a pleading setting forth the defense for which intervention is sought.

/s/ EDWARD M. CURRAN
District Judge

DO NOT OPPOSE

/s/ JAMES F. BELL
James F. Bell
1001 Connecticut Avenue, N.W.
Washington, D. C.

Attorney for plaintiff

JOHN W. DOUGLAS

Assistant Attorney General

By /s/ R. DICKEY HAMILTON
R. Dickey Hamilton
c/o Department of Justice
Washington, D. C.

Attorney for defendant Saxon

Cross Motion of Plaintiff for Summary Judgment

Comes now the Plaintiff, which opposes Defendant First Security Bank's motion for summary judgment, and moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor against Defendant Comptroller on the following grounds:

1. There is no genuine issue as to any of the material facts upon which Plaintiff relies in support of its cross motion, and

2. Plaintiff is entitled to summary judgment as a matter of law.

/s/ James F. Bell
James F. Bell

Attorney for Plaintiff
Commercial Security Bank
of Ogden

1001 Connecticut Avenue, N.W.
Washington 6, D. C.

Plaintiff's Statement of Material Facts Pursuant to Local Civil Rule 9(h)

Plaintiff, in support of its cross-motion for summary judgment herein, and pursuant to Rule 9(h) of the Local Rules of this Court, hereby sets forth a statement of the material facts in support to its cross-motion for summary judgment and contends there is no genuine issue as to these facts so stated:

1. Plaintiff is a State bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It maintains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the authority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah. (Complaint, para. 2)

2. On June 25, 1963, the First Security Bank of Utah, N.A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish and operate a branch bank on Harrison Boulevard,

between 30th and 36th Streets, in Ogden, Utah. (Complaint, para. 2; Memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 1)

3. The First Security Bank of Utah, N.A., is a national banking association chartered by the Comptroller of the Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office and one branch (Complaint, para. 4; Memorandum of Defendant First Security in Support of Motion for Summary Judgment, para. 2).

4. There are four banks transacting business in the City of Ogden, Utah. Plaintiff, Defendant First Security Bank of Utah, N.A., the Bank of Utah, and the Bank of Ben Lomand. (Complaint, para. 7)

5. The City of Ogden (1960 Pop. 70,197) is a city of the "second class", as such city is defined in Utah Code Ann. Title 10, Chap. 1, Sec. 1 (1953 as amended), having a population of more than 30,000 and less than 90,000 persons. (Complaint, para. 6)

6. On June 9, 1964, the Defendant Comptroller notified the Defendant First Security Bank of Utah that its branch application was approved, but he has not yet set a date for the issuance of the certificate of authority authorizing Defendant First Security to operate said branch.

7. On July 19, 1963, Judge Curran issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First Security. Prior to the expiration date of that order, counsel for Commercial Security and Comptroller filed a Stipulation with this Court by which it was agreed "that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction", and "that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq.,

of the Comptroller's intention to issue the certificate, Commercial Security Bank will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction". Notice has not been given pursuant to the Stipulation. (Stipulation between counsel for Commercial Security and Defendant Comptroller filed with this Court; memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 2.)

Respectfully submitted,

/s/ JAMES F. BELL
James F. Bell

Attorney for Plaintiff
Commercial Security Bank
of Ogden

1001 Connecticut Avenue, N.W.
Washington 6, D. C.

Motion for Summary Judgment

Comes now Intervenor, First Security Bank of Utah, N.A., and moves this Honorable Court to grant summary judgment on behalf of Defendants herein and as grounds therefor states:

1. There is no dispute between the parties as to any relevant facts herein.

2. As a matter of law, the Comptroller of the Currency:

   (a) has the authority to issue a branch certificate to Intervenor;

   (b) is not bound by Utah law except as to location, and, therefore, has discretionary power to grant the authority to establish a branch to Intervenor.

WHEREFORE, the premises considered, Intervenor, First Security Bank of Utah, prays that this Honorable Court grant its Motion for Summary Judgment.

WHITEFORD, HART, CARMODY & WILSON

By JOHN J. WILSON
CHARLES J. STEELE
815 - 15th Street, N.W.
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Attorneys for Intervenor, First Security Bank of Utah, N. A.

Defendant, First Security Bank of Utah's, Statement of Material Facts Under Rule 9(h)

Defendant, First Security Bank of Utah, in support of its Motion for Summary Judgment herein, and pursuant to Rule 9(h) of this Court, hereby sets forth a Statement of Material Facts in support of its Motion for Summary Judgment:

1. Plaintiff, Commercial Security Bank, is a State bank with its principal office in Ogden, Utah.

2. Defendant, First Security Bank of Utah, is a National bank with its principal office in Ogden, Utah.

3. Defendant, First Security Bank of Utah, a National bank, applied to the Comptroller of the Currency on June 25, 1963 for authority to open a branch in Ogden, Utah, on Harrison Avenue.

4. Subsequently, on July 3, 1963, the Plaintiff, Commercial Security Bank, filed its application to move its 25th Street Branch to Harrison Boulevard. On July 11, 1963, the State Banking Commission gave its written approval to said Bank for the change in location as requested.

5. On July 18, 1963, Plaintiff filed its Motion herein for Declaratory Judgment, Injunctive Order and for a Preliminary Injunction.

6. Banks located in Ogden, Utah, are:

(1) Plaintiff, Commercial Security Bank;

(2) Defendant, First Security Bank of Utah;

(3) The Bank of Utah; and

(4) The Bank of Ben Lomand.

Respectfully submitted,

WHITEFORD, HART, CARMODY & WILSON

By JOHN J. WILSON
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Motion of Defendant, James J. Saxon, Comptroller of the Currency, to Dismiss the Complaint

Defendant, James J. Saxon, Comptroller of the Currency, by his undersigned attorneys, moves the Court to enter an order dismissing the complaint upon the grounds that:

1. Plaintiff lacks standing to maintain this action, and

2. The complaint fails to state a claim upon which relief can be granted.

Attached hereto and in support of this motion is a memorandum of points and authorities.

JOHN W. DOUGLAS
Assisant Attorney General

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Attorneys,
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Attorneys for James J. Saxon,
Comptroller of the Currency

Memorandum & Order

This matter came before the Court on the motion to dismiss filed by defendant Comptroller and the cross motions for summary judgment of Intervenor and Plaintiff.

The relevant facts are not in dispute and can be stated as follows:

Plaintiff, a state bank, and Intervenor, a national bank, each have their principal office and one branch in the city of Ogden, Utah. Two other state banks have their main offices in Ogden, the Bank of Utah and the Bank of Ben Lomand. Since Ogden has a population of between 30,000 and 90,000 persons, it is classified as a city of the "second class" by the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)).

On June 25, 1963, the First Security Bank, Intervenor, filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish an additional branch office in Ogden. The requested branch would be in addition to the four main bank offices and two branches presently in existence in Ogden. Shortly thereafter, on July 18,

1963, the Commercial Security Bank brought this action against the Comptroller, seeking a declaratory judgment that approval of the branch application would violate 12 U.S.C.A. § 36, and an injunction to restrain the Comptroller from issuing the certificate evidencing approval of the branch. In addition, plaintiff sought preliminary injunctive relief pending disposition of the case.

Judge Curran on July 19, 1963, issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First National. Prior to the expiration date of that order, on July 26, 1963, counsel for Commercial Security and the Comptroller filed a Stipulation with the Court by which it was agreed:

> ". . . that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction . . . that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction."

On June 9, 1964, the Comptroller notified the First Security Bank of Utah that its branch application had been approved, but the Comptroller has not, as yet, notified counsel for Plaintiff of his intention to issue the certificate of authority.

The First Security Bank was granted leave to intervene as a party defendant on June 26, 1964.

At the outset, the Comptroller contends that the Commercial Security Bank has no standing to bring this suit. The contention can be disposed of by reference to the uncontroverted affidavit of the president of plaintiff bank that if the certificate of authority is issued to the First Security Bank, plaintiff will sustain damage to its busi-

ness and profits of upwards of fifty thousand dollars a year and plaintiff would have no adequate remedy at law, and by the following holding of our Court of Appeals in *Whitney National Bank* v. *Bank of New Orleans and Trust Company*, 323 F. 2d 290, 300 (C.A.D.C., 1963), cert. granted 376 U.S. 948:

> "The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."

The Comptroller further contends that his determination, based upon his statutory interpretation of 12 U.S.C. § 36(c), should be upheld by this Court unless it is clearly unreasonable. Whatever be the merits of this contention, it is clearly not the law in this Circuit. In both *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 778, affirmed per curiam 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960), and the *Whitney National Bank* case, *supra*, at page 300, the Court stated, ". . . there is no discretion to unlawfully issue a certificate", and went on to an independent interpretation of 12 U.S.C. § 36(c) and the applicable state law.

The sole question before this Court is whether the Comptroller of the Currency has the statutory authority to grant a certificate to First Security Bank of Utah, N.A., for the establishment of a new branch in the city of Ogden, Utah.

The applicable statutory law primarily involved is clause (1) of Title 12, U.S.C. § 36(c) (1927, as amended), which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish

> and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;* . . .". [emphasis supplied].

Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), provides as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch *until such bank shall have been in operation as such for a period of five years.*" [emphasis supplied].

As stated above, Ogden, Utah, is not a city of the "first class," and there are already located in Ogden four main bank offices and two branch banks. It is clear to this Court at the outset that a state bank would be prohibited from opening a branch in Ogden unless it took over one of the existing banks which had been in operation for at least five years. Thus, if a state bank had applied to the Utah Bank Commissioner for a branch in Ogden under the same conditions which the First Security Bank applied to the Comptroller in this case, the application would clearly have been denied.[1] The question before this Court, there-

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[1] A recent decision of the Supreme Court of Utah, *Walker Bank & Trust Co. v. Taylor*, 390 P. 2d 592 (1964), construed the Utah statute with regard to Provo, Utah, which, like Ogden, is a city of the "second class." The court there held that under the Utah branch statute, *de novo* branching by a State bank was prohibited in a city of the "second class" even when it was the *only* unit bank in the city.

fore, has been narrowed down to whether or not clause (1) of 12 U.S.C. § 36(c) requires the Comptroller to apply to the establishment of national bank branches exactly the same statutory standards as apply to the establishment of state bank branches.

The defendants argue that if it is at all possible for a state bank to establish a branch in the city in question, then the Comptroller may approve a branch for a national bank, whether or not the national bank meets the specific requirements of a state law which would be applied to the state bank. The plaintiff, on the other hand, argues that the Comptroller must apply the same statutory standards as would be applied to a state bank.

In *Commercial State Bank of Roseville* v. *Gidney, supra,* an opinion affirmed by our Court of Appeals, Judge Youngdahl of this Court held that indeed it was ". . . the apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches." (at page 775). Judge Youngdahl applied a Michigan state court case in granting a preliminary injunction against the Comptroller restraining him from issuing a branch certificate to a national bank in Michigan. The holding was in terms of § 36(c) generally, though the provision involved in that case, set out in clause (2) of § 36(c), deals only with branches outside of the city in which the main office of the bank is situated.

On the other hand, the learned Judge Christensen of the United States District Court of Utah, Northern Division, recently held that the Comptroller is *not* held to specific conditions of Utah law in granting branches to national banks under clause (1) of § 36(c), that the granting of express authority for branch banking was all that is necessary for the Comptroller to authorize intra-city branch banking by a national bank. *Walker Bank & Trust Co.* v. *Saxon,* 234 F. Supp. 74 (1964). In that case, the defend-

ant national bank, located in a "second class" city, as is the situation in the instant case, was not required to take over an existing bank in order to establish a new branch. The *Commercial Bank of Roseville* case, *supra*, as well as other cases emphasizing the controlling effect of the conditions specified by state law, were distinguished as constructions of subsection (c), clause (2). Judge Christensen held that Congress did not intend to apply the same conditions to clause (1) as it did to clause (2) of subsection (c), and he justified this distinction by the difference in language between the two clauses and by reference to legislative history of the enactments of clause (1) in 1927 and of clause (2) in 1933.

After a careful consideration of Judge Christensen's opinion, which seems to be directly in point with the case at hand, and with due deference and respect for its learned brother, this Court feels impelled to reach a different conclusion as to the construction to be given to clause (1) of § 36(c).

It seems clear to the Court that in order for the "dual banking system" of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12, U.S.C.A. §§ 21-213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states

[2] 12 U. S. C. A. §§ 36(c), 51, 85, 92a(a), and 214c.

are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks.

Prior to 1927, however, there was a serious inequality between state and national banks in the important area of branching. There was no provision for branches in the National Bank Act, and the Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no branch authority whatever. *First National Bank of Missouri* v. *Missouri*, 263 U.S. 640 (1924). Many states at that time did allow branching, however, and as a result, the competitive situation was so imbalanced that the Comptroller in his 1924 report (Government Printing Office), stated at page 4:

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city branching in my opinion involves the question of the perpetuation of the national banking system."

This situation was the background for the enactment of the McFadden Act of 1927, part of which is now § 36(c), clause (1). That statute also amended the Federal Reserve Act to prohibit new branches outside the corporate limits of the municipality in which the main office was located to state banks which were members of the Federal Reserve System. The purpose of the Act, and this is borne out by a study of the legislative history, was obviously to correct the competitive imbalance. The Banking Act of 1933 removed the above restriction on state member banks and in addition enacted what is now clause (2) of 13 U.S.C.A. 36(c) (1933, as amended) set out below:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . .(2) at any point within the State in which said association is situated, if such

> establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to locations imposed by the law of the State on State banks . . .".

In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.

Thus, this Court feels, in light of the *Commercial State Bank of Roseville* case, *supra,* that it is bound to hold that the exact standards of the Utah branching law must be applied to the First Security Bank of Utah, N.A., and that the Comptroller does not possess the statutory authority to authorize the branch in question.

Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks. Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended.

Thus, the Court will grant the declaratory judgment that the issuance by the defendant, Comptroller of the Currency, of his certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N.A., of Ogden, Utah, of a branch on Harrison Boulevard between 30th and 36th Streets,

Ogden, Utah, would constitute a violation of 12 U.S.C.A. § 36. The Court will also enjoin the defendant Comptroller of the Currency from issuing the above certificate of authority.

Accordingly, there being no material issue of fact, and in light of the above opinion, it is by the Court this 18th day of December, 1964,

ORDERED, that the Motion to Dismiss filed by defendant Comptroller of the Currency be, and the same hereby is, denied;

ORDERED, that the Motion for Summary Judgment filed by the Intervenor-Defendant, First Security Bank of Utah, be, and the same hereby is, denied; and further

ORDERED, that the Motion for Summary Judgment filed by the Plaintiff, Commercial Security Bank, be, and the same hereby is, granted.

IT IS FURTHER ORDERED, that the defendant Comptroller of the Currency be, and he hereby is, enjoined from authorizing the establishment of the branch bank by the First Security Bank of Utah, N.A., which is the subject matter of this cause of action.

LEONARD P. WALSH
Leonard P. Walsh, *Judge*

Notice of Appeal

Notice is hereby given this 12th day of February, 1965, that FIRST SECURITY BANK OF UTAH, N.A., Intervenor-Defendant, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of December, 1964 in favor of Plaintiff, COMMERCIAL SECURITY BANK, against

said Defendants, First Security Bank of Utah, N.A. and James J. Saxon, Comptroller of the Currency.

/s/ Charles J. Steele

Attorney for First Security Bank of Utah, N.A.

Notice of Appeal

Notice is hereby given this 15 day of February, 1965, that defendant, James J. Saxon, Comptroller of the Currency hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of December, 1964 in favor of Commercial Security Bank and against the defendant, James J. Saxon, Comptroller of the Currency.

Richard S. Beatty

Attorney for Def., James J. Saxon

Order

Pursuant to the provisions of Rule 73(g) of the Federal Rules of Civil Procedure, it is this 19th day of March, 1965,

Ordered, that the Intervenor First Security Bank of Utah's time for filing and docketing the record on appeal with the United States Court of Appeals for the District of Columbia Circuit is hereby extended fifty (50) days, to and including May 13, 1965.

/s/ Burnita Shelton Matthews
Judge

REPLY BRIEF OF APPELLANT, FIRST SECURITY BANK OF UTAH, N.A.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19356

FIRST SECURITY BANK OF UTAH, N.A., *Appellant*

v.

COMMERCIAL SECURITY BANK, *Appellee*

No. 19357

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Appellant*

v.

COMMERCIAL SECURITY BANK, *Appellee*

Appeals From the United States District Court for the District of Columbia

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19356

FIRST SECURITY BANK OF UTAH, N.A., *Appellant*

v.

COMMERCIAL SECURITY BANK, *Appellee*

No. 19357

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Appellant*

v.

COMMERCIAL SECURITY BANK, *Appellee*

Appeals From the United States District Court for the District of Columbia

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REPLY BRIEF OF APPELLANT, FIRST SECURITY BANK OF UTAH, N.A.

In its Brief, at Page 9, Appellee admits, as indeed it must, that the laws governing State banks and the National Bank Act, which governs national banks, "vary in many significant areas". All parties to this appeal agree, therefore, that there is no over-all federal "policy of equaliza-

tion". Had it wished to establish such a "policy of equalization", Congress would have done so by simply enacting a statute making national banks subject to the State laws governing State banks in the particular State in which the national bank was located. Congress, however, did not do this. National banks are subject to the laws of the United States, and are not subject to the laws of the State, except in so far as Congress has expressly provided. *Van Reed* v. *People's National Bank*, 198 U.S. 554, 557 (1905); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558-559 (1963).

Appellee christens the area dealing with branch banking "a basic competitive area", and states that in *this* area, there must be exact equality between state and national banks because of its "basicness". Many pages of Appellee's brief are devoted to this thesis, and much legislative history is quoted. The unquestionable fact remains, however, that in this case, unless Congress expressly provided that the laws of the State of Utah dealing with the method of establishing a branch of a State bank shall also control the method whereby national banks may establish a branch, the action of the Comptroller in authorizing a branch to Appellant was proper, and the judgment of the Court below should be reversed.

The words of 12 U.S.C. 36(c)(1), the governing statute, are clear and unambiguous. That Section provides that a national bank may, with the Comptroller's approval, establish a branch within the limits of the city in which it is situated, if such establishment is at the time expressly authorized to State banks by the laws of the State in question. As Judge Christenson found in *Walker Bank & Trust Co.* v. *James J. Saxon and the First National Bank of Logan*, 234 F. Supp. 74, 77, branches *are* expressly authorized to State banks by Utah law under the circumstances of the present case. No one really takes issue with the fact that both Appellant, a State bank, and Appellee, a

national bank, are authorized to establish branches in Ogden, Utah. The crux of the case is whether Appellant is bound by the condition of "acquisition" placed upon State banks by a State statute. No federal statute states that this State limitation on the method of establishing a branch shall apply to national banks, and no one even suggests that other State conditions, such as those dealing with capitalization and other requirements, apply to national banks,[1] but Appellee terms the matter of branches, "a basic competitive area", and states, therefore and *ipse dixit*, that the Utah limitation on method must be read into federal law.

To support its position, Appellee begins by taking the phrase, "policy of equalization", from the case of *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). The *Lewis* case involved a federal statute enacted in 1930, dealing with the security which could be given for public monies deposited in banks and not pertinent to the instant case. In fact, the 1930 Act provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited *of the same kind as is authorized by the law of the State in which such association is located* in the case of other banking institutions in the State." (Emphasis added)

The language emphasized is of the broad type *not present* in the instant case. When, in some *dicta* in the *Lewis* case, the Court speaks of a "policy of equalization" in connection with federal bank branching, it should be remembered that the "equalization" extends no farther than Congress provided, and Congress nowhere provided that it should extend to the point where a State can impose limitations of method on the way a national bank may establish a branch.

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[1] See opinion of Judge Christenson at 234 F. Supp. 78, f.n. 8.

In its brief, Appellee next turns to *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, *aff'd per curiam*, 106 U.S. App. D.C. 37, 278 F.2d 871 (1960). In addition to the fact that the *Gidney* case involved a different issue completely, and a different section of the statute, it also appears that the arguments presented in the instant case were not presented to the Court in *Gidney*.[2] This is understandable since the overriding issue in the *Gidney* case was the question of what constituted a "village", and the question of the limitation of method of establishing a branch of a national bank was not even before the Court.

Appellee next turns for support to the very recent case of *Jackson* v. *First Nat'l Bank of Valdosta*, No. 21821, July 22, 1965 (5th Cir.). The issue in that case, also, was not the issue in the instant case. In the *Jackson* case, a State Superintendent of Banks sought a declaration that a national bank could not lawfully open a drive-in banking facility 281 feet away from its main office, and separated from that office by an alley and several buildings which were not owned by the Bank. The Comptroller of the Currency felt that his approval to open the drive-in window was not necessary since, in his view, the drive-in window was not a branch at all, but was an extension facility of the main office. The Court found against the national bank, holding that the national bank was bound by State law in this respect, and a State bank could not open such a drive-in window. The *Jackson* holding would be applicable in the instant case only if a State bank located in Ogden could not establish a branch. This, however, is not the case. In fact, State banks can establish branches in Ogden.

National Bank of Detroit v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir., 1958), cited at pages 16-17 of Appellee's

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[2] In its Brief, at Pages 44 and 45, Appellee makes much of the fact that the Comptroller's action in this case was "unique". The fact that a government agency does not make use of its statutory powers, or does not even know it has the power, does not mean that the power is lacking, and the Supreme Court so held in *United States* v. *DuPont*, 353 U.S. 586 (1957).

brief, is even less applicable than *Gidney* or *Jackson*. The crucial element in the *Wayne Oakland* case was neither "location" nor "method", but "time". At the time the National Bank of Detroit wanted to open a branch in Troy, Michigan, no State bank could establish a branch there under any circumstances. Since this was so, the Court held that neither could a national bank do so. The national bank had maintained that it had a right to establish a branch in Troy because a State bank had previously done so. The Court, however, cited 12 U.S.C. § 36, that a national bank may establish a branch, " • • • at any point within the State in which said [bank] is situated, if such establishment and operation are *at the time* authorized to State banks, et cet." (252 F.2d at 540, emphasis, the Court's).

Suburban Trust Co. v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963) is cited at page 17 of Appellee's brief as relying upon the *Gidney* and *Wayne Oakland* cases, and, as we have seen, those cases involved issues different from those present in the instant case. The *Suburban Trust Co.* case also involved outside branches and 12 U.S.C. § 36(c)(2). In the *Suburban Trust Co.* case, the court, commenting on a provision of the pertinent New Jersey statute, said:

> "That limitation constitutes a '*restriction as to location*' within the meaning of 12 U.S.C. § 36(c) and is therefore incorporated in Section 36(c) and made applicable to • • • [the National bank seeking a branch]." (Emphasis added)

The case, therefore, went off on the legitimate issue of location, not whether or not New Jersey law could also prescribe the method by which the national bank branch could be established.

South Dakota v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), aff'd 335 F.2d 444 (8th Cir., 1964), *cert. den.* 379 U.S. 970 (1965), cited at page 19 of Appellee's

brief, also relied upon the *Wayne Oakland* case. In *South Dakota* at page 446 of 335 F.2d the court said:

> "12 U.S.C.A. § 36(c), so far as here material, authorizes national banks to establish branches in states where statutes specifically grant state banks power to operate branches subject to all restrictions on *location* imposed upon state banks by state law." (Emphasis added)

Again, the court recognized that the so-called "policy of equalization" referred to *location*. No mention was made of "method" or of "means".

The last of the cases chiefly relied upon by Appellee in its brief is *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), rev'd, 379 U.S. 411 (1965). This case is cited by Appellee in connection with the arguments over standing and the weight to be given an administrative interpretation of the Comptroller of the Currency. It is interesting to note, however, that in the opinion of the Supreme Court reversing the Court of Appeals, the geographical nature of the limitation on the Comptroller was recognized when the court said:

> "La. Rev. Stat. § 6:54 (1950) prohibits banks from opening branch offices in parishes other than their home parish, and these *geographical limitations* are made applicable to national banks by the Banking Act of 1933, 12 U.S.C. § 36(c)(2) (1958 ed.)." (Emphasis added) 379 U.S. 411, 13 L.Ed. 2nd, 386, 390, f.n. 1.

CONCLUSION

Despite the impressive volume of cases cited in the brief of Appellee, the fact remains that there is but one other case in point, and that is *Walker Bank & Trust Co.* v. *Saxon*, 234 F. Supp. 74 (D. Utah, 1964), which holds exactly contrary to Appellee's position. Also of primary importance is the fact that, under the clear wording of the statute, the Comptroller acted properly in authorizing a

branch to Appellant because the establishment and operation of branches in Ogden by Utah State banks were and are expressly authorized to State banks by Utah Code Annotated, 1953, Sec. 7-3-6. Nowhere does the law state that the Comptroller, in addition to the requirements of that statute, must also not authorize the establishment of a branch unless it is established through the same method or means by which a State branch is established. Appellee is asking the Court to read this additional limitation on the Comptroller into 12 U.S.C. § 36(c). Appellant respectfully submits, however, that if national bank branches are to be further limited, and new conditions as to method added to the existing conditions concerning location, it is the Congress, and not the courts, which should effect this change.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

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Appeals from the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

(1) Whether the district court properly held that the Comptroller of the Currency was without authority to authorize First Security Bank of Utah to establish a de novo branch bank in Ogden, Utah, where state law prohibits a state bank from establishing such a branch, and where Congress had required the Comptroller in Section 36(c) of the National Bank Act to follow state law as the standard for the establishment of national bank branches.

(2) Whether the district court properly held that appellee had standing to maintain this action.

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CITATIONS

Cases:

Statutes: Page

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* Cases or authorities chiefly relied upon are marked by asterists.

IN THE

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Appeals from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE [1]

Appellee, Commercial Security Bank, is a state bank chartered in 1925 under the banking laws of the State of Utah. It has its main office and a branch in the City of Ogden, Utah (JA-3). Ogden is classified under the laws of the State of Utah as a city of the second class (JA-4).

Appellant, First Security Bank of Utah (First Security), is a national bank chartered under the National Bank Act. It also has its main office in the City of Ogden (JA-3).

Appellant, James J. Saxon is the Comptroller of the Currency (Comptroller). He is authorized under Section 36(c) of the National Bank Act to approve the application of a national bank for a branch banking office in the same city as its main office where "such establishment and operation are at the time expressly authorized to state banks by the law of the State in question" (JA-3, 4).

Two other state banks, the Bank of Utah and the Bank of Ben Lomand, have their main offices in the City of Ogden (JA-4). Accordingly, there are four banks in Ogden, Utah.[2]

On June 25, 1963, First Security filed an application with the Comptroller, pursuant to 12 U.S.C. § 36(c), for permission to establish a new branch office in Ogden (JA-20). On July 18, 1963, appellee brought an action in the district court to enjoin the Comptroller from issuing a certificate evidencing his approval of the application and for a declaratory judgment that the issuance of such a certificate is barred by 12 U.S.C. § 36(c) and Section 7-3-6, Utah Code Ann. (JA-5-6).

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[1] References are to the Joint Appendix filed in No. 19357.

[2] In addition, both appellant First Security and appellee each have a branch in Ogden established prior to enactment of the existing provisions of Utah branch law pertinent to this case.

On July 19, 1963, Judge Curran issued a temporary restraining order enjoining the Comptroller from issuing to First Security Bank a certificate for the proposed new branch (JA-14). Pursuant to a stipulation, the hearing on the motion for preliminary injunction was postponed indefinitely (JA-16, 17).

On June 9, 1964, the Comptroller notified First Security that its application for a branch bank was approved (JA-25). However, no certificate evidencing that approval and authorizing First Security to establish its proposed new branch has yet been issued due to the stipulation entered into between the appellee and the Comptroller in this case.

On June 26, 1964, the Comptroller moved to dismiss the complaint (JA-18). The same day, First Security was granted leave to intervene as a party defendant (JA-25). Appellee filed a cross-motion for summary judgment. Subsequently, First Security also filed a motion for summary judgment (JA-24). The case was heard by the court on these motions.

On December 18, 1964, Judge Walsh issued his memorandum and order denying the Comptroller's motion to dismiss and First Security's motion for summary judgment, granting appellee's motion for summary judgment and permanently enjoining the Comptroller from authorizing the establishment of the proposed branch bank (JA-24-30).[3] The court held initially that appellee had standing to sue and that the Comptroller had "no discretion to unlawfully issue a certificate". In answering the question whether the issuance of a certificate in this case would be unlawful, the court found:

> (1) That 12 U.S.C. § 36(c) provides for the establishment and operation of new national bank branch

[3] *Commercial Security Bank* v. *Saxon*, 236 F. Supp. 457 (D.D.C. 1964).

offices only "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;"

(2) That section 7-3-6 of the Utah Code prohibits the establishment of a branch bank in a city, other than a city of the first class, where a bank is presently located and doing business "unless the bank seeking to establish such branch shall take over an existing bank . . . . [which] shall have been in operation as such for a period of five years;"

(3) That Ogden, Utah is a city of the second class having four main bank offices and two branches—none of which are to be taken over by the proposed new branch;

(4) That, therefore, "if a state bank had applied to the Utah Bank Commission for a branch in Ogden . . . the application would clearly have been denied."

(5) That the purpose of 12 U.S.C. § 36(c) was "to establish competitive equality" between national banks and state banks with regard to branching and it is to be interpreted in this light;

(6) That, therefore, a national bank is precluded by 12 U.S.C. § 36(c) from establishing a branch bank where under the same circumstances a state bank would be precluded by state law from establishing a branch bank.

The Comptroller and First Security each noted an appeal from this decision.

STATUTES INVOLVED

The relevant statutes, 12 U.S.C. § 36(c) and Section 7-3-6 of the Utah Code Annotated, are set forth in the appendix to the Comptroller's brief and at pages 3 and 4 of First Security's brief.

SUMMARY OF ARGUMENT

The statutes of the fifty states relating to branches of state banks vary widely. (See Appendix A). They reflect the particular needs of each state relative to their differing economies, as well as divergent philosophies of the degree of protection which should be afforded small unit banks throughout the state from branches of large city banks. Thus, some sixteen states prohibit all branching. Eleven other states permit unlimited statewide branching. The remaining twenty-three states permit branches with widely varying restrictions, primarily related to geography [4] and numbers of banking offices,[5] in an effort to tailor branching requirements to the varying economic conditions within the state itself. Utah is an example of this latter category.[6] It permits de novo branches in the larger cities of the state, but prohibits such de novo branches in the smaller cities if there is already any state or national bank providing a banking service there.[7] The only way in which a bank may establish an additional banking office in a smaller city in which there is a unit bank already in operation, is to merge with the unit bank and to continue to operate the offices of the merging bank as

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[4] Branches may be confined (a) to the city and/or county of the head office and/or contiguous counties; (b) to a specified mileage radius of the head office; or (c) to any of the foregoing dependent upon a minimum population or population range.

[5] The usual provision is that no branch may be established in a designated area where there is already a main office or branch of a state or national bank in operation.

[6] Section 7-3-6 of the Utah Code Annotated (1953) is set out in the appendix to the Comptroller's brief.

[7] Section 10-1-1 of the Utah Code Annotated, classifies cities in Utah by "classes" according to population. Section 7-3-6, *supra*, permits branching (a) in cities of the "first class" which, under the classification exceed 90,000 in population, or (b) in unincorporated areas in which such first class cities are located. In other than first class cities, the more restrictive branching policy set forth above is applicable.

a branch.[5] In this respect, the provisions of the Utah statute are similar to those of twelve other states (Appendix B).

The existence of such a multiplicity of varying state branch laws creates a very practical problem. It is obvious that without competitive equality in such an important area as the right to branch between state and national banks operating side by side in each state, the "dual banking system" could not long survive. The class of banks suffering from the competitive disadvantage would quickly convert to the other system. In recognition of this fact, Congress has established a policy of equalization between state and national banks in the matter of branching by prescribing state law as the standard for the establishment of branches by national banks under Section 36(c) of the National Bank Act, 44 Stat. 1228-1229 (1927), as amended, 12 U.S.C. 36(c) (1964 Supp.). That Congress intended to establish such competitive equality between state and national banks in the matter of branching clearly emerges from a study of the legislative history of Section 36(c) (pp. 8-32, *infra*). Further, it is established law under decisions of the Supreme Court, *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934); of this Court, *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), *aff'd. per curiam*, 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960); and of other courts, *Jackson* v. *First Nat'l. Bank of Valdosta*, No. 21821, July 22, 1965 (5th Cir.); *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830; *Bank of Dearborn* v. *Saxon*, No. 23628, July 12, 1965 (W.D. Mich.); *Suburban Trust Co.* v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1968); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D.

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[5] Section 7-3-6 also provides that such unit bank must have been in operation five years.

1963), *aff'd.* 335 F. 2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965).

The construction given to Section 36(c)(1) of the National Bank Act by the incumbent Comptroller of the Currency, without any cited administrative or judicial precedent during the thirty-eight years this provision has been in the law, is absolutely irreconcilable with the policy of equalization established by Congress in the matter of branching by national and state banks. It destroys competitive equality in branching not only in Utah, but in the twelve other states with similar statutes (Appendix B). State banks are prohibited from establishing de novo branches in the city of Ogden, Utah, or in any other city of the "second class" where there is an existing banking facility. Their sole right to branch in such locations is to take over a unit bank which is then in operation and continue to operate the banking office of the merging bank as a branch. Nevertheless, the Comptroller has authorized a national bank to establish a de novo branch in Ogden which is prohibited to state banks. It is impossible to argue, and we do not understand the appellants to so argue, that an unlimited right to establish de novo branches is competitively "equal" with a right to continue to operate the offices of a merging bank as a branch. The *only* way in which Congressional intent to insure competitive equality between national and state banks in the matter of branching can be maintained in this case is by a construction of Section 36(c) and of the Utah statutes which prohibits de novo branching by *both* national and state banks in the city of Ogden. Appellee urges this Court to affirm the decision of the court below so holding.

ARGUMENT

I. The court below properly held that the Comptroller of the Currency was without statutory authority to authorize First Security Bank of Utah to establish a branch bank in Ogden, Utah.

A. *In the National Bank Act, Congress has adopted a "policy of equalization" between national and state banks.*

Appellee does not quarrel with the proposition, advanced with considerable vigor by the appellants, that national banks are federal instrumentalities subject to the paramount law of the United States. That issue has long since been resolved in the great constitutional debates which surrounded the creation of the First (1791-1811) and Second (1816-1832) banks of the United States holding charters from Congress.* Although many persons, including Jefferson, who opposed the creation of the First Bank, and Jackson, who vetoed the charter of the Second Bank, felt that Congress had no Constitutional authority whatever to charter banks, Chief Justice John Marshall set the matter to rest in his opinion in *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819). While recognizing that "it does not appear that a bank was in the contemplation of the framers of the Constitution", he enunciated the doctrine of implied powers and held that a bank could be chartered by Congress as a financial agent of the federal government to assist in the implementation of the federal government's fiscal powers which were specifically granted to Congress by the Constitution. The question of the paramount authority of Congress over national banks has, therefore, long since been settled.

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* See e.g., Conant, *A History of Modern Banks of Issue* (G.A. Putnam's Sons, New York and London, 1915); Kane, *The Romance and Tragedy of Banking* (The Bankers Publishing Co., N.Y., 1923); Prochnow, *American Financial Institutions* (Prentice Hall, 1961).

Nor does appellee quarrel with the corollary to the principle set forth above that Congress, *if* it wished to do so, could have barred the applicability of state law to the operations of national banks. The question, however, which forms the pivotal background for the principal issue in this case, is the *extent* to which Congress elected to permit the applicability of state law to national banks, and, indeed, the extent to which it intended to *adopt* state law as the standard for banking operations of national banks.

The creation of the dual banking system by the addition of a system of national banks under federal charter operating side by side in each state with state banks under state charter required Congress to *affirmatively* decide this question.[10]

The necessity for such affirmative action arose because of the fact that national and state banks are competitors for depositors in each state. It is elementary economics that although state statutes, governing state banks, and the National Bank Act, governing national banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any state must rest upon an equality in certain basic competitive areas. If one or the other class of banks in a particular state has

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[10] It did not do so immediately because the "birth" date of the dual banking system, as we know it today, must realistically be placed some time later than the passage of the National Bank Act. In 1865, Congress placed a prohibitive tax on state bank notes, then the principal source of state bank income, with the avowed purpose of putting state banks out of business. As a result the number of state banks declined drastically and the survival of the state banking system was largely accredited to the growth and profitability of deposit banking. See sources cited in note 9, *supra*. By 1892, however, almost 30 years after the prohibitive bank note tax, the number of state banks overtook the number of national banks and the dual banking system may by then be considered as having been firmly established. Board of Governors of the Federal Reserve System, "Banking Studies" (1941), pp. 15, 418.

far more liberal rights and privileges than the other in such important areas as the right to branch, to perform trust functions, to pay interest on deposits, or charge interest on loans, etc., the underprivileged banks would quickly convert to the other system leaving the dual banking system an empty shell. The court below made this point very succinctly at 236 F.Supp. 460:

> "It seems clear to the Court that in order for the 'dual banking system' of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21-213), to continue to function as such there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking."

Congress solved the foregoing problem in a very practical way:

First, it decided upon a "policy of equalization" between national and state banks by *adopting* State law as the standard for national banks in most of the important competitive areas. *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). In that case the question was whether a 1930 amendment to the National Bank Act authorizing a national bank to "give security" for state deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of national banks for such deposits, had the right to give the more impressive security of a general lien. The Supreme Court ruled in favor of the general lien on the basis of the "policy of equalization" which it held Congress had adopted in the National Bank Act. At 292 U.S. 564, 565, Mr. Justice Brandeis, writing for the Court said:

> "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The *policy of equalization* was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation.[2] In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches;[3] in those conferring power to act as fiduciary;[4] in those concerning interest on deposits;[5] and in those concerning capitalization."[6] (Footnotes omitted) (Emphasis supplied).

In footnote 3 relating to the policy of equalization as applied to branches, the Court cited both the McFadden Act of 1927 and the Banking Act of 1933 from which subdivisions (1) and (2) of Section 36(c) of the National Bank Act were derived.

Thus, some of the more important instances of the specific adoption of state law in the National Bank Act are as follows: (a) *Branches.* Section 36(c) adopts state law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. § 36(c) (1964 Supp.). (b) *Fiduciary powers.* The Comptroller may grant a permit to national banks, "when not in contravention of State or local law", to "act as a trustee . . . or in any other fiduciary capacity in which State banks . . . which come into competition with National banks are permitted to act under the laws of the State in which the National bank is located." 76 Stat. 668 (1962), 12 U.S.C. § 92(a) (1964 Supp), replacing 38 Stat. 26 (1913). (c) *Interest on loans.* National banks may charge interest on loans allowed by the law of the state where the bank is located if such a rate is greater than 1% in excess of the discount rate on ninety-day paper in effect at the local federal reserve bank. 48

Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1958). (d) *Interest on time and savings deposits.* National banks may not pay a greater rate of interest than the maximum rate authorized by law upon such deposits by banks organized under the laws of the state in which the national bank is located. 44 Stat. 1224-25, 12 U.S.C. § 371. (e) *Capitalization.* In certain instances state law is the measure of allowable capitalization of new national banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1958). (f) *Merger and conversion.* No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the National banking association is located." 64 Stat. 456 (1950), 12 U.S.C. 214c (1958).

The foregoing principle has been reflected in numerous decisions and was accepted by the court below which stated:

> "Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states are permitted to control national banks to a great extent, but the states must apply the came controls to state banks as they do to the national banks. 236 F. Supp. at 460

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[2] 12 U.S.C.A. §§ 36(c), 51, 85, 92a(a), and 214c."

See, also, *Jackson* v. *First Nat'l Bank of Valdosta*, No. 21821, July 22, 1965 (5th Cir.), *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830; *Federal Deposit Ins. Corp.* v. *Tremaine*, 133 F. 2d 827 (2d Cir. 1943); *Bank of Dearborn* v. *Saxon*, No. 23628, July 12, 1965 (W.D.

Mich.); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F. 2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), *aff'd per curiam*, 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960).

Secondly, in addition to specifically applying state law to national banks in many instances, Congress did not seek to occupy the field so as to preclude the application of state laws to national banks which do not conflict with federal law. Sometimes it made a specific reservation of power, as for example, the reservation to the state of broad areas of taxation of national banks, 44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958), and the reservation of powers over bank holding companies, and bank subsidiaries, in the Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1958. The courts have also enunciated this general principal on a number of occasions. Thus in *First Nat'l Bank* v. *Missouri*, 263 U.S. 640 (1924), the Supreme Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to national banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co.*, a portion of which opinion is quoted above illustrating the "policy of equalization", the Supreme Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 229 U.S. 559, 565-6.[11]

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It is thus very important to note at the outset of a consideration of the issue in this case that Congress has given a *special* significance to the applicability of state law to the national banks which it has created. It has

[11] See, also, *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944); *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

intended an applicability of such law in many of the most important and vital areas of banking. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive.[12] It is in this light that the issue before this Court must be considered.

B. *Nowhere has the Congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in Section 36(c) wherein Congress required the Comptroller to follow state law as the standard for the establishment of branches of national banks.*

1. *Case Law*

It is now established law that Congress intended equality between state and national banks regarding the estab-

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[12] The "policy of equalization" is entirely consistent with the proposition that the National Bank Act "constitutes 'by itself a complete system for the establishment and government of National Banks.'" *Deitrick* v. *Greaney*, 309 U.S. 190, 194 (1940). As noted above, the "policy of equalization" was *incorporated* by Congress into that system by the adoption of certain nondiscretionary state laws to be applied by the Comptroller in his regulation of national banks, and by provision for the applicability to national banks of state laws which do not conflict with the pattern established in the Act. Congress went no further, and certainly did not, for example, jeopardize the independence of the national banking system, and hence the "duality" of the dual banking system, by subjecting any decision of the Comptroller to a review or approval by a State Supervisor. *Rushton ex rel State Banking Comm'r.* v. *Michigan Nat'l. Bank*, 298 Mich. 417, 299 N.W. 129 (1941). The very concept of the dual banking system embraces an independence of action on the part of both the Comptroller and the states in the establishment of national and state banks, although "cooperation" between the two "appears to have been intended by Congress. . . ." *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 543 (6th Cir. 1958), *cert. denied*, 358 U.S. 830. However, the independence of the Comptroller within the pattern of the National Bank Act does not embrace a complete independence of state laws. Congress, in its "policy of equalization" reflected in the Act, has demonstrated a clear intent that national banks be subject to such state laws in many of the most important areas of banking.

lishment of branches through the adoption of state law as the standard for the establishment of branches by national banks.[12]

In *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 774 (D.D.C. 1959), *aff'd per curiam* by this Court, 108 U.S. App. D.C. 37, 278 F.2d 871 (1960), the court said:

> "Branch banking (banking operations at other than the principal office) by national banks is regulated by state law because Congress has so provided. That is, Congress has adopted state law on the establishment of branches by state banks as the measuring stick for the establishment of branches by national banks. 12 U.S.C.A. 36(c)." (Footnote omitted).

Later the court referred to the

> ". . . apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches." (Footnote Omitted). (Emphasis in opinion) 174 F. Supp. at 755

The court below was of the opinion that *Gidney* controlled the disposition of the principal issue in this case. It said at 236 F. Supp. 461:

> "Thus, this Court feels, in light of the Commercial State Bank of Roseville case, supra, that it is bound to hold that the exact standards of the Utah branching law must be applied to the First Security Bank of Utah, N.A., and that the Comptroller does not

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[12] The sole exception is the decision of the United States District Court for the District of Utah in *Walker Bank & Trust Co.* v. *Saxon*, 234 F. Supp. 74 (1964), *appeal docketed*, No. 7981 (10th Cir.). This decision was specifically rejected by the court below. The faulty reasoning of the *Walker Bank* decision is demonstrated in this brief through discussion, and rejection, of arguments advanced by appellants herein which are substantially the same as the points relied upon by the *Walker Bank* case.

possess the statutory authority to authorize the branch in question."

The court below went further. It said:

"Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met."

In *Jackson* v. *First Nat'l Bank of Valdosta*, No. 21821, July 22, 1965 (5th Cir.) the court said:

"We start with the proposition that the source of First National's authority to open up the disputed drive-in window must be found in Section 36(c) of the National Bank Act. That statute is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and in *South Dakota*, *supra* at 846, that Congress did not have to give effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct 'policy of equalization' for our dual banking system." Slip opin. p. 6.[14]

In *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830, the Court of Appeals for the Sixth Circuit reviewed the legislative history of Section 36(c) and concluded:

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[14] The reference to *South Dakota* is to *South Dakota* v. *National Bank of South Dakota*, discussed at p. 17, *infra*. The reference to the "policy of equalization' is no doubt to the portion of the opinion of the Supreme Court in *Lewis* v. *Fidelity & Deposit Co.*, quoted at p. 11, *supra*.

> "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank." 252 F.2d at 540.

In *Wayne Oakland* the court applied provisions of the Michigan statute, similar to that of the Utah statute here involved in that it provided that "no branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation". The court held that the Comptroller was prohibited by Section 36(c) of the National Bank Act, incorporating Michigan branch law, from issuing a certificate of authority to a national bank to establish a new branch in Troy, Michigan, after the establishment of a branch there by a state bank.

The principle of competitive equality between national and state banks in the matter of branching was also asserted by the district court in *Suburban Trust Co.* v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963). The court there quoted, and relied upon, the portions of the *Roseville* and *Wayne Oakland* opinions also quoted above, 211 F. Supp. 694, 697, 698.

And the district court in *South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965), emphasized the point that state branch law is not applicable to the national banks *per se*, but through its adoption by Congress, as the "practical way" to "insure equality between state and national banks regarding the establishment of branches." The court said:

> "Under 12 U.S.C.A., § 36(c), state law is adopted by the federal government and made the measuring stick by which it is determined whether national banks may establish branches." 219 F. Supp. 846.

The court then went on to cite in support of this proposition *Wayne Oakland*, *Suburban Trust*, and *Roseville*, *supra*, and concluded, in an excellent summary of this whole matter:

> "It is clear that the purpose of Congress in adopting § 36(c) was to insure equality between state and national banks regarding the establishment of branches. National Bank of Detroit v. Wayne Oakland Bank, supra. The adoption of § 36(c) was a practical way of accomplishing this purpose. The result of the adoption of § 36(c) is that there is now paramount federal law on the subject, and thus the states may no longer adopt and enforce their own laws restricting or prohibiting branching by national banks. It is true that states may restrict or prohibit branching by their own state banks, with the result that national bank branching is *similarly* restricted or prohibited. This is possible because Congress made it so." 219 F. Supp. at 846 (Emphasis supplied).

Finally, in another recent decision, *Bank of Dearborn* v. *Saxon*, No. 23628, July 12, 1965 (W.D. Mich.), a case involving the authority of the Comptroller to approve the relocation of branches, the court quoted Section 36(c) of the National Bank Act and commented:

> "It will be observed in the above statutory enactment that the law of the state involved is to be determinative as to the problem of branching. National banks were given the same opportunity for branching as state banks, thus perpetuating the dual banking system." Slip opin. p. 10.

2. Legislative history of Section 36(c)

The case law set forth above establishes unequivocally the proposition that Congress intended in Section 36(c)

of the National Bank Act to insure equality between state and national banks regarding the establishment of branches by having "*exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state branches", as the *Roseville* opinion states.

A review of the legislative history of Section 36(c) will readily demonstrate the correctness of this conclusion.

Prior to 1927. Between 1864 and 1927, the National Bank Act did not provide for the establishment of branches by national banks. The Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no authority to branch. *First Nat'l Bank* v. *Missouri*, 263 U.S. 640 (1924). The law of many states, on the other hand, permitted state-chartered banks to establish branches.

Prior to the turn of the century, this situation created no problem. At that time there only were 87 banks (82 state and 5 national) operating a total of 119 branches, most of which were outside of the head office city. By the end of 1923, however, there were 671 banks (580 state and 91 national) operating 2,054 branches, most of which were in the head office city.[15] In his Annual Report for 1923, the Comptroller of the Currency, after discussing the matter said (p. 6):

> "If, however, state member banks engage in unlimited branch banking, it will mean the eventual destruction of the national banking system. . . ."

And in his 1924 Report, he said (p. 4):

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city banking in my opinion in-

[15] "Banking Studies", note 10, *supra*, at p. 428.

> volves the question of the perpetuation of the national banking system."

By this time, Congress had become aware of the problem. The House Banking and Currency Committee held hearings in April of 1924 at which the Comptroller of the Currency reiterated his warning. He said:

> "But I would like to get down to the essence of the particular situation confronting us, what I am confronted with every day in my office. Our national banks are very clearly slipping . . . It is the branch-banking situation which is forcing the issue. For example one bank with $60,000,000 deposits, one of the largest banks in the South, nearly left the system this year and it was only because we were able to persuade them of the probability of legislative relief and that they would be on a parity with State banks as regards branch banking that they determined to retain their charter." [16]

The House Committee then reported out a bill, the purpose of which was to equalize national and state bank branching opportunities by granting national banks the right to establish branches in their home-office towns, where such branches were permitted state banks by state law, and by limiting branching by state bank members of the Federal Reserve System (then, as now, the largest of the state banks) to such in-town branches.[17] The House Report said:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further

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[16] Hearings before House Committee on Banking & Currency on H.R. 6855, 68th Cong., 1st Sess. (1924), at p. 34. See also pp. 17 and 30.

[17] H.R. Rep. No. 583, on H.R. 8887, House Banking and Currency Committee, 68th Cong., 1st Sess. (1924), §§ 8 and 9.

> extension of State-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." [18]

And when the bill reached the floor, Representative McFadden, its sponsor, said:

> "I may say here that permission for national banks to meet the competition of State banks engaged in branch banking in certain large cities is absolutely vital to the maintenance of the National banking system. It is an economic fact easily demonstrated by reference to recent banking history that the national banks in those cities where the State banks are engaged in branch banking will gradually die out for want of the power to meet their competitors on equal terms unless this provision of the bill is enacted into law." [19]

This bill passed the House.[20] However, although a similar bill was recommended favorably by the Senate Banking and Currency Committee,[21] it failed of passage prior to the expiration of the 68th Congress.[22]

McFadden Act of 1927. The bill which ultimately became the McFadden Act of 1927 passed during the 69th Congress. Competitive equality was achieved granting national banks the right to have intra-city branches

> "if such establishment and operation are at the time permitted to State banks by the law of the State in question"

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[18] *Idem.*

[19] 65 Cong. Rec. 11298 (1924).

[20] See H.R. Rep. No. 83, 69th Cong., 1st Sess., p. 2 (1926).

[21] S. Rep. No. 666 on S. 3316, Senate Banking and Currency Committee, 68th Cong., 1st Sess. (1924).

[22] Note 17, *supra.*

and, at the same time, limited state bank members of the Federal Reserve System to intra-city branching. 44 Stat. 1228 (1927), as amended 12 U.S.C. 36(c) (1964 Supp.); 44 Stat. 1229 (1927), 12 U.S.C. 321 (1958).

One important additional indication of the mood of Congress in making it clear that the question of the desirability of branches was a matter strictly up to the *states* to decide emerged from the Senate rejection of the so-called "Hull amendments" to the House bill in the 69th Congress. The House bill (H.R. 2) had originally proposed that national banks might only establish inside branches at the time of the enactment of the bill. No right was given to such national banks if, at a later time, state law permitted state banks to establish inside branches.[23] The Senate Banking and Currency Committee, however, struck that provision on the grounds that it constituted an unwarranted "pressure" by Congress on state legislatures to decline to expand branch authority, and that the matter of branching privileges was a matter for the *states* to decide. It said:

> "The real purpose of the Hull amendments, as shown by the testimony given before your committee, is to bring pressure to bear upon the leading bankers in States which now prohibit branch banking by depriving them of the motive to seek a change in the State laws favorable to branch banking. It is to coerce them to remain silent. Your committee feels that this is an unprecedented policy for the Federal Government to pursue and constitutes an unwarranted interference with the rights of citizens of these States in their relationship to the State legislatures." [24]

The specific language contained in Section 7 of the bill

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[23] Note 17, *supra*, at pp. 2, 4.

[24] S. Rep. No. 473, 69th Cong., 1st Sess. (1926), pp. 9-10.

reported by the Senate Banking and Currency Committee provided

> "(c) A national banking association may, after the date of the approval of this act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question." [25]

Section 9 also provided that no state member bank of the Federal Reserve System

> ". . . may retain or acquire stock in a Federal Reserve Bank except upon relinquishment of any branch or branches established after the date of the approval of this act beyond the limits of the city, town or village in which the parent bank is situated." [26]

The Report concluded:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws.[27]

The Senate position was adopted in Conference.[28] The bill was finally approved on February 25, 1927, and became known as the McFadden Act of 1927. Representative McFadden in explaining the bill as finally passed, said:

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[25] *Idem*, pp. 3, 4.

[26] *Ibid.*

[27] *Idem*, at p. 14.

[28] H.R. Rep. No. 1481, 69th Cong., 1st Sess., p. 6 (1926).

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal reserve system." 69 Cong. Rec. 5815 (1927).[29]

Banking Act of 1933. During the depression, a fundamental challenge to the principle of competitive equality in branching occurred. Many persons felt that many bank failures during the Bank Holiday were due to the fact that small rural banks were not strong enough to weather economic adversity, and that these locations could best be served by branches of larger and stronger banks. Their view was that branch banking should be authorized for national banks *regardless* of state branch law in order to meet what was considered to be a crisis in banking.[30]

This view was stated by the dominant banking figure of the times, Senator Carter Glass of Virginia. Accordingly, in 1932, the Senate Banking and Currency Committee reported out a bill, S. 4412, to expand the authority of a national bank to establish branches granted

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[29] The statute as finally passed also contained a grandfather clause applicable to all pre-1927 branches. It also imposed one additional restriction upon branching by national banks, regardless of whether state law permitted unlimited intra-city branching, by including a provision limiting the number of branches in cities with a population of 100,000 persons. 44 Stat. 1228. This provision was repealed by the Banking Act of 1933 and replaced with a provision gearing the number of branches to a graduated bank capitalization dependent upon population, 48 Stat. 162, 190, which remained the law until 1952 when it was repealed. See H.R. Rep. No. 2423 (82nd Cong., 2nd Sess. 1952), 1952 U.S. Code Cong. & Admin. News, p. 2197.

[30] See, *e.g.*, testimony of Comptroller of the Currency, J. W. Pole, during the 1931 hearings before the Subcommittee of the Senate Banking and Currency Committee. Hearings before a Subcommittee of Senate Committee on Banking & Currency, pursuant to S. Res. 71, 84th Cong., 1st Sess. (1955), pp. 7-19.

in the McFadden Act of 1927 beyond just the municipality in which its main office was located, *irrespective* of state law. The Senate Report, in its section under "Insolvency of Banks," said:

> ". . . provision for branch-banking powers under carefully qualified conditions with a view to making a larger experiment with branch banking is deemed essential and due provision for it is made. Specifically, what is proposed is the grant of power to establish branches of national banks not merely in the towns and cities in which they are located but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws." [31]

This proposal met with vigorous opposition. It was obvious that if national banks were granted a competitive advantage over state banks in the matter of branching, state banks would convert to national banks and the state banking system would be destroyed, unless the state legislatures in all of the non-branch or limited-branch states moved immediately to conform their statutes to this unrestricted branch proposal—the reverse effect of the situation in 1922-27 when the Comptroller argued that unless national banks were given the right to branch in competition with state banks, the national banking system would be destroyed. Thus, Senator Norbeck, writing for the Minority of the Senate Committee ". . . in protest against the proposed extension of the branch banking. . . ." said:

> "In speaking of our banking system, we must keep in mind that we have: (1) A system of national banks chartered and supervised by the Federal Government. (2) We have a competitive system, that of State banks, chartered and supervised by the States.

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[31] S. Rep. No. 584, 72nd Cong., 1st Sess., p. 11 (1932).

> There is difference of opinion among well-informed people as to their comparative merits, and certainly there is a great desire on the part of certain people to wipe out the State banking system. What can not be done directly by law may be done by giving the national system such an advantage that the competitive system can not exist." [22]

The debate continued on the floor of the Senate. 75 Cong. Rec. 9890 *et seq.* Senator Glass pressed the need for statewide branching regardless of state law in order that larger banks could take over smaller banks and convert them into branches. 75 Cong. Rec. 9974 (1932). Senator Norbeck led the opposition proposing an amendment

> ". . . to strike out section 19 of the bill, which permits an enlargement of the branch-banking privileges.
>
> I do that mainly because I believe in the American system of banking. We have a dual system. We have two systems. We have one controlled by the States, we have another one controlled by the Federal Government. The two have grown up side by side. I think they have rendered splendid service, and I think we should be ever jealous of anything that will tend to destroy one system for the benefit of the other." 75 Cong. Rec. 9974 (1932).

And later he said:

> "It is a bill to establish a new system of banking all over the United States, to do away with the dual system of banking, and to substitute a single system of banking, which I feel will be under too much central control." 75 Cong. Rec. 13002 (1932).

A compromise position was finally taken between Senator Glass' unlimited branch expansion position and Sena-

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[22] S. Rep. No. 584, 72d Cong., 1st Sess. (1932) Pt. II (Minority Views), p. 1.

tor Norbeck's resistence to any branch expansion. The bill was finally passed after an amendment was adopted on the floor of the Senate whereby national banks could establish out of town branches if such branches could be established by state banks by the law of the state in question, thus restoring the principle of competitive equality. This amendment was known as the Bratton amendment, and, as it finally emerged, was itself amended by amendments of Senators Wheeler and Blaine.

Senator Bratton of New Mexico said:

> "I think the proposed bill goes too far. It seems to me that the question of whether branch banking shall be permitted in a given State should be determined by that State. . . . We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not." 76 Cong. Rec. 1449 (1933).

Accordingly, he proposed an amendment which read as follows:

> "A national banking association may establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time permitted to State banks by the law of the State in question." 76 Cong. Rec. 1997 (1933).

Senator Wheeler of Montana supported Senator Bratton. He said

> ". . . I do not want the United States Government to permit the establishment of branches in States where the people by express statute have forbidden it; or where they have not passed upon the matter, I do not want to permit national banks to go in there and establish branches against the will of the people." *Idem.*

Senator Wheeler also requested that the words "expressly authorized" be substituted for the word "permitted" in the Bratton amendment, which he explained as desirable to handle his concern that a state statute silent on the matter of branching might be construed as permitting branch banking.[33]

The following day, the Bratton amendment "as perfected" was read by Sen. Bratton as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized for State banks by the law of the

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[33] The following interchange at 76 Cong. Rec. 1997 (1933) between Senators Glass and Wheeler set forth the purpose of the amendment:

> "Mr. Glass. What is the difference between authorization and permission?
>
> Mr. Wheeler. Quite a vast difference, if the Senator will permit me to say so, by reason of this fact:
>
> In the State of Montana and in a number of other States there is no law expressly either prohibiting or permitting State branch banking; but the State bank examiner has held that there is nothing in the charter of the State banks permitting a branch bank. Under that construction, in my humble opinion, branch banks could be established in that State unless they were expressly prohibited by the law of the State. Consequently, I wanted a provision to be placed in the statute that branch banks shall not be permitted in a State unless the legislature or the people themselves, through an initiative, actually by law say that they shall be permitted there.
>
> Mr. Glass. Mr. President, I have never been in favor of subterfuge of any nature in legislation, and I am sure the clear-headed distinguished Senator from New Mexico is not proposing to engage in any subterfuge.
>
> Mr. Wheeler. Oh, no.
>
> Mr. Glass. What we mean is that national banks may have branches in those States which permit the same privilege to State banks."

> State in question. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000." 76 Cong. Rec. 2079 (1933).

At this point, the following colloquy took place:

> "Mr. Blaine. May I inquire further of the Senator if this language is embraced in the amendment which he proposes?—
>
> And under restrictions as to location imposed by the law of the state on State banks.
>
> Mr. Bratton. Mr. President, that is not included in the text as I read it. The Senator from Wisconsin suggested that amendment to me; and if he proposes it, I shall be agreeable to it." 76 Cong. Rec. 2079 (1933).

Senator Blaine did not amplify or explain the purpose of his amendment and there was no further discussion of the matter. Including the Blaine Amendment, the Bratton Amendment then read:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000." 76 Cong. Rec. 2205 (1933).

As such, the amendment passed the Senate on January 21, 1933. 76 Cong. Rec. 2208.

The bill failed to pass the House, however, as the 72nd Congress expired. Accordingly, in May of 1933, both the Senate and House Committees on Banking and Currency favored reported legislation, S. 1631, and H.R. 5661, which contained the Bratton amendment and passed in the prior session. S. Rep. No. 77, on S. 1631, pp. 11, 16-17, 73d Cong., 1st Sess. (1933); H. R. Rep. No. 150, on H.R. 5661, p. 4, 73d Cong., 1st Sess.

Senator Glass in reporting on S. 1631 on the floor of the Senate, said:

> "There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those states which by law permit branch banking to State banks. It went even farther under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks.
>
> How any fair person may properly object to a provision of that sort, I do not understand. We here in the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate." 77 Cong. Rec. 3726 (1933).

After passage by both the House and Senate, the bill went to Conference. The Conference Committee amended the phrase "law of the State in question" in the first part of the Bratton amendment to read "statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition." No explanation was given for the insertion of this language. At the same time the numbers of (1) and (2) were added to form the present subdivisions of Section 36(c). H.R. Rep. 254, 73d Cong., 1st Sess., p. 29 (1933).

The Banking Act of 1933 was finally enacted on June 16, 1933. National banks were permitted to establish out-of-town branches if such branches were authorized to state banks under state law. At the same time the restriction was removed on branches of state banks which were members of the Federal Reserve System, previously imposed by the McFadden Act of 1927. 48 Stat. 164, 12 U.S.C. § 321. Thus, the Banking Act of 1933 established the same competitive equality between national and state banks in the matter of branching outside city limits which the McFadden Act of 1927 had established for inside branches.

* * * *

The compelling conclusion reached from the foregoing review of the legislative history of the McFadden Act of 1927 and the Banking Act of 1933 is the identical one expressed in the judicial decisions discussed at pp. 14-18 above. Congress felt that it was imperative for the preservation of the dual banking system that there be competitive equality between national and state banks in the matter of branch banking. The manner in which Congress achieved that competitive equality was by having ". . . *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to state bank branches". *Commercial State Bank of Roseville, supra.*

Attention will now be turned to the question of how the Comptroller's interpretation of Section 36(c) in this case, rejected by the court below, measures up to Congressional intent in Section 36(c) as set forth above.

C. *A certificate issued to the appellant, First Security Bank of Ogden, Utah, to establish a branch in Ogden would violate the positive, unequivocal and dominant expression of Congressional intent in Section 36(c) of the National Bank Act to insure equality between national and state banks in the matter of branching.*

There can be no question but that the construction given to Section 36(c) by the Comptroller, rejected by the court below, would create a serious competitive imbalance between state and national banks in the matter of branching in the city of Odgen, in every other city of Utah which is not a city of the "first class", and in every other city in every one of the other twelve states where a similar statutory provision to that of Utah prevails. National banks are permitted to establish de novo branches at locations where there are existing banking offices, whereas state banks may not do so. Their sole right to branch in such locations is to take over a unit bank which is then in operation and continue to operate the banking office of the merging bank as a branch. It is impossible to argue, and we do not understand the appellants to so argue, that an unlimited right to establish de novo branches is competitively "equal" with a right to continue to operate the offices of a merging bank as a branch.

Accordingly, the *only* issue for resolution is whether Congress intended such competitive inequality in Section 36(c) of the National Bank Act. Appellee respectfully submits that such is *not* the case.

The construction given to Section 36(c) by the Comptroller, and rejected by the court below, is absolutely ir-

reconcilable with Congressional intent in Section 36(c) as demonstrated in the cases and legislative history deployed above. The purpose of the McFadden Act of 1927 was not to give national banks a *competitive advantage* over state banks in the matter of branching—the result of the Comptroller's interpretation of Section 36(c)(1). It was to create *competitive equality*. And a similar purpose was evident in the legislative history of the Banking Act of 1933 in which Section 36 (c)(1) was *reenacted* in connection with the passage of Section 36(c)(2).

The *only* way in which Congressional intent to insure competitive equality between national and state banks in the matter of branching can be maintained in this case is by a construction of Section 36(c) and of the Utah statute which prohibits de novo branching by *both* national and state banks in the city of Ogden. Appellee urges this Court to so hold.

D. *The arguments advanced by the appellants to the effect that Congress intended an avoidance of state branch law in the transaction here involved are erroneous and must be rejected.*

The following portion of this brief will answer various arguments advanced by the appellants in support of their proposition that Congress really intended to permit national banks to establish de novo "inside" branches in Ogden, Utah, although such de novo branches are admittedly prohibited to similarly situated state banks under Utah branch law. In answering these arguments of appellants, appellee will also be demonstrating the error in the reasoning advanced by the district court in the *Walker Bank* case, *supra*, upon which appellants so heavily rely.

1. ***The appellants have misconstrued the phrase "expressly authorized" in Section 36(c)(1) of the National Bank Act.***

Section 36(c)(1) permits branching by national banks only if "expressly authorized" to state banks by state law. Appellants in effect conclude that if a state bank is authorized to continue to operate the banking offices of a unit bank with which it has merged as a "branch", then there is all the "express authority" required to permit national banks to establish unlimited de novo branches. In other words, if a state statute authorizes *any* form of branching, however restricted, the Comptroller is automatically given an apparently unrestricted right to permit branching by national banks. (Comptroller's brief, pp. 45-49)

Appellants' conclusion does *not* emerge from the phrase "expressly authorized" in Section 36(c)(1). Permission to establish a de novo branch is not *expressly* authorized by permission to continue to operate the office of a merging bank as a branch. To argue otherwise is to give the word "expressly" a strained meaning within the framework of the definition of the word "express" which Webster defines as "clearly stated", "definite", "exact", "precise".[24]

In any event, the construction which appellants have given to the phrase "expressly authorized" cannot be made in the light of the legislative history of the enactment of that phrase. It will be recalled that the words were not in Section 36(c)(1) as originally enacted by the McFadden Act of 1927. (pp. 21-23, *supra*). They were added to Section 36(c)(1) when that section was reenacted in the Banking Act of 1933, along with subdivision (2), at the request of Senator Wheeler, who sought to make sure that no national bank branch would be authorized

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[24] *Webster's New Practical Dictionary* (1961).

simply because a state law was silent on the matter of branching (pp. 27-28, *supra*). Since these words were added to make it clear that branching authority must be *expressly* authorized in, and not *implied* from, a state statute, it is difficult to understand how de novo branching at a particular location can be "expressly" authorized in a statute which does not permit it.

2. ***There is nothing in the language of Sections 36(c) (1) and (2) of the National Bank Act which indicates Congressional intent to have a more relaxed standard of "branch equality" for inside branching than for outside branching.***

Appellants argue that

> "the organization of Section 36(c) into two subdivisions . . . shows separate and distinct legislation concerning such branching, and requires that subdivision (1) be given meaning and operative effect of its own" (Comptroller's brief, pp. 18-19).

It is difficult to reconcile this argument with *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 564, (1934) where the Court cited *both* the McFadden Act of 1927 and the Banking Act of 1933, embracing subdivisions (1) *and* (2) of Section 36(c), as examples of the "policy of equalization" underlying the National Bank Act. See p. 11, *supra*. In any event, error in the argument is apparent from a discussion of the two differences in the language used in subdivisions (1) and (2).

1. As finally enacted in the Banking Act of 1933, subdivision (1) permitted national bank inside branches only if such branches were "expressly authorized to State banks by the statute law of the State in question," and subdivision (2) permitted national bank out-of-town branches only if such branches were "authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and

not merely by implication or recognition. . . ." Both of these phrases say precisely the same thing: a state *statute* must *expressly* authorize a branch to a state bank before a similarly situated national bank may be permitted to establish a branch. There is nothing in the words used which even suggests in the slightest that subdivision (1) constitute a more "relaxed" standard of equality for branching than that of subdivision (2).

Nor is there anything in the legislative history of the Banking Act of 1933 which suggests any different intent by the use of the different phraseology. As noted above, the words "expressly authorized" were suggested by Senator Wheeler and, as originally included in the Bratton amendment, were applicable to *both* inside and outside branches. (p. 28, *supra*). At that time there was no subdivision (1) and (2) in the proposed amendments to Section 36(c). The breakdown into the two subdivisions took place in Conference. The phrase "expressly authorized" was left as applicable to subdivision (1) only, and the phrase "affirmatively and not merely by implication or recognition" etc., was added to subdivision (2). Both phraseology were obviously intended to accomplish the same result: to bind the Comptroller by a *statutory* provision, but not by a State regulation or administrative determination. *Cf., South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 848-851 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965).

2. The other difference in language between subdivisions (1) and (2) is the phrase "and subject to restrictions as to location imposed by the law of the State on State banks" which appears in subdivision (2) but not in (1).

As noted at p. 29, *supra*, this phrase was a floor amendment offered by Senator Blaine to the Bratton amendment to the provision ultimately enacted as subdivision (2) in the Banking Act of 1933. To the extent any contrasting significance should be given to the pres-

ence of this phrase in subdivision (2), and its absence from subdivision (1), it most certainly does not support the conclusion of the appellants that subdivision (1) has a *less* rigid standard of equality than subdivision (2). Indeed, singling out only "location" restrictions in subdivision (2) would superficially appear to indicate an intent that *all* restrictions, of whatever nature, were clearly to be applicable to national bank branches under subdivision (1), the provision here involved. However, for the reasons set forth at pp. 47-50, *infra*, it is apparent that the "location" language does not carry any such significance—either way—and *exactly* the same standards—state law—apply to the establishment of national and state bank branches under *both* subdivisions.

3. ***There is nothing in the legislative history of Sections 36(c)(1) and (2) of the National Bank Act which indicates Congressional intent to have a more relaxed standard of equality for inside branching than for outside branching.***

Appellants suggest that the legislative history of the McFadden Act of 1927 in contrast to the legislative history of the Banking Act of 1933 justifies the conclusion that Congress intended a more relaxed standard of equality for in-town branches authorized in 1927 than for out-of-town branches authorized in 1933. (Comptroller's Brief, pp. 35-36; First Security's Brief, pp. 9-15).

Again, it is difficult to reconcile this argument with *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 564 where the Court cited *both* the McFadden Act of 1927 and the Banking Act of 1933 (subdivisions 1 and 2 of Section 36(c) of the National Bank Act) as examples of the "policy of equalization" underlying that Act.

In any event, appellants are clearly wrong.

The legislative history of the McFadden Act of 1927, both as cited by appellee at pp. 8-32, *supra*, and as de-

ployed at length in the Comptroller's brief at pp. 20-24, demonstrates unequivocably Congressional intent to correct the competitive imbalance existing prior to 1927 when state banks were permitted by state law in several states to branch, whereas national banks were denied this privilege. The mode which Congress selected to accomplish this result was (1) to grant national banks the right to establish branches in their home-office towns, where such branches were permitted state banks by state law, and (2) to limit branching by state bank members of the Federal Reserve System to such inside branches. Thus, as Mr. McFadden, the sponsor of the bill stated:

> ". . . *competitive equality* has been established among all member banks of the Federal Reserve System." (Emphasis supplied) 69 Cong. Rec. 5815 (1927)

The Comptroller's argument that "Congress did not intend to establish 'competitive equality' between state and national banks in the matter of inside branching" (Brief, p. 35) is simply irreconcilable with the very facts of legislative history which are cited in its own brief. His allegedly supporting argument that Congress did not intend "competitive equality", but rather, "to enhance the competitive position of national banks" (*Ibid*) is nothing more than a play on words. Congress corrected a competitive imbalance by bringing national banks into a position of competitive equality with state member banks. If that is what the Comptroller means when he speaks of Congress enhancing "the competitive position of national banks", then he is simply stating the fact in different words—Congress established "competitive equality" in the matter of branching.

Further, the Comptroller's argument that Congress did not create "competitive equality" because it did not permit national banks to establish outside branches (Brief, pp. 12, 24), is only part of the story. At the same time as Congress permitted national banks to establish inside

branches, it *restricted* state member banks (then, as now, the largest of the state banks) to inside branches, thus establishing competitive equality between all national banks and state member banks.[35]

Finally, the Comptroller would draw some support for his proposition from the fact that an amendment offered by Senator Vandenberg during the course of the debates was not accepted by the Senate. (Brief, pp. 31-32, 38) Senator Vandenberg, like Senator Glass, proposed an amendment to permit branches by national banks regardless of state law, the only difference being that Senator Vandenberg would have only permitted such branches in communities where there were no banking facilities whatever, or by a take-over of an existing banking facility. (See Comptroller's Brief, p. 31 and 76 Cong. Rec. 2206) However, as noted earlier, Congress rejected any proposition under which national banks could establish branches without regard to state law, and the Vandenberg amendment was not even voted upon, much less adopted. Such a vignette of legislative history is hardly a substantially foundation for the unique construction given to this legislation by the Comptroller 38 years after its passage.

Thus, appellee submits that appellants err in reaching the conclusion that Congressional intent emerging from the legislative histories of the McFadden Act of 1927 and the Banking Act of 1933 were different *at all* on the issue of competitive equality, much less so dramatically differ-

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[35] Indeed, Congress could do no more. Its authority over state member banks stemmed entirely from the fact that they voluntarily accepted federal regulation as the "price" for the benefits of membership in the Federal Reserve System. See *Westfall* v. *United States*, 274 U.S. 256, 258-9 (1927). It is doubtful whether Congress would have had the constitutional authority to restrict branching of non-member state banks. Of course, the Banking Act of 1933 placed national banks on a plane of competitive equality with *all* state banks by permitting statewide branching to the extent permitted to state banks under state law.

ent as to justify a conclusion that Congress intended a more relaxed standard of equality for inside branching than for outside branching. There is *nothing* to support this proposition in the legislative reports or debates, as is evident from the detailed review of the legislative history set forth at pp. 8-32, *supra*. Further, the argument is, in itself, inconsistent with the fact that subdivision (1), as originally enacted in 1927, was *re-enacted* in 1933, at the same time subdivision (2) was added, and was fully discussed at that time. Indeed, in the re-enactment the words "expressly authorized" were substituted for the word "permitted" in subdivision (1) to nail down the standard of competitive equality evident in *both* subdivisions (p. 28, *supra*).

4. *The distinction offered by the appellants for rejecting all prior judicial authority construing Section 36(c) of the National Bank Act is in error.*

At pp. 6-7, *supra*, appellee cited decisions of this Court; of the Fifth and Sixth Circuits, and of District Courts in New Jersey, South Dakota and Michigan, all standing for the proposition that Congress intended to insure equality between state and national banks regarding the establishment of branches through the adoption of state law as the measuring stick for the establishment of branches by national banks.

At pp. 37-41 of his Brief, the Comptroller appears to have mounted a frontal attack on the validity of *all* of these cases by arguing that legislative history of Section 36(c) of the Banking Act of 1933 does not support the concept of competitive equality in branching, even as to outside branches. This argument is simply untenable in its entirety, as demonstrated from the legislative history of Section 36(c)(2) set forth at pp. 8-32 *supra*. Indeed, it is difficult to see how the Comptroller could have even made such an argument in view of his entirely correct citation from the closing arguments of Senator

Glass, the sponsor of the bill, made after he had accepted the Bratton amendment, to the effect that the purpose of the bill was to put ". . . national banks on a plane of *competitive equality* with state banks in the respective states. . . ." (Emphasis supplied) (Comptroller's Brief, p. 38. For the full quote, see p. 30 *supra*.)

In any event, the Comptroller quickly appears to have abandoned this argument for he quickly moves in his Brief (pp. 41-45) to the position that all of the cases cited by appellee for the proposition of "competitive equality" related to Section 36(c)(2) embracing outside branches, not Section 36(c)(1) embracing inside branches, and the pertinent provision in this case. This is a strained distinction, unsupported by the cited cases.

The *Wayne Oakland Bank* case, the first in the series of these decisions, set forth the legislative history of both the McFadden Act of 1927 *and* of the Banking Act of 1933, in reaching its conclusion that the "history of federal legislation regarding branch banking" leaves "a clear and definite impression" that Congress intended competitive equality in the matter of branch banking. 252 F. 2d 537, 540. Branch banking was also broadly discussed in *Roseville*, *supra*, in reaching its conclusion, *unrestricted* as to the "subdivisions" of Section 36(c), that "branch banking . . . by National banks is regulated by state law because Congress has so provided", 174 F. Supp. 770, 774, reflecting a Congressional intent ". . . to have *exactly* the same standard—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches." 174 F. Supp. 770, 775. Similarly, the *South Dakota* court discussed branching under Section 36(c) without reference to subdivisions and emphasized that state law was adopted by Congress as the "practical way" to "insure equality between state and national banks regarding the establishment of branches." 219 F. Supp. 842, 846.

Thus, these cases cannot be read as the appellants would read them. The reflection of Congressional intent therein expressed is patently applicable to Section 36(c) *in its entirety*, not just to subdivision (2), to the exclusion of subdivision (1). The court below was therefore entirely correct in its conclusion that:

> "In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner." 236 F. Supp. 461.

Finally, after the appellants' briefs were filed in this Court, the Fifth Circuit issued its decision in *Jackson* v. *First Nat'l Bank of Valdosta*, No. 21821, July 25, 1965. This case distinctly puts to rest any arguments advanced by appellants as to a lack of precedent on the principle of "competitive equality" applicable to inside branches under Section 36(c)(1) of the National Bank Act. That specific appeal involved an inside branch and, after quoting Section 36(c)(1) in its entirety, along with the definition of a "branch" in Section 36(f), the court concluded:

> "Thus a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state law to open a similar office. In this way, Congress sought to insure equality between state and national banks regarding the establishment of branches. *South Dakota* v. *National Bank of South Dakota*, D.S.D. 1963, 219 F. Supp. 842, 846." (Slip opin. p. 3)

5. ***Exact equality in the matter of branching between national and state banks in no way conflicts with the "paramount federal law authorizing national bank branching."***

Appellants argue that since "Congress has occupied the field of national bank branching . . . . imposition of

such restrictions would be in conflict with paramount federal law authorizing national bank branching." (Comptroller's brief, pp. 15-17)

Appellants err. As noted at pp. 8-9, *supra*, no one quarrels with the proposition that national banks are federal instrumentalities subject to the paramount law of the United States, or with its corollary that Congress could, *if* it had wished to do so, have provided for branching by national banks completely independent of state law. The question of the scope of the applicability of state branch law to national banks in this case is not an exercise in harmonizing with an uncontested principle. It is a question of an ascertainment of Congressional intent as to the extent to which it wished to *adopt* state law as the standard for branches of national banks.

When the issue before this Court is thus properly framed, it is apparent that the position of exact equality in the matter of branching by the use of state law as the standard for branching of national banks, far from being "out of harmony with the essential character of the National banking system", is in *precise* accord with the regulatory "policy of equality" established by Congress in the National Bank Act.

6. *There is no administrative interpretation by the Comptroller supporting the position of the appellants to which any weight can, or should be, ascribed.*

The *Walker Bank* court held that "the administrative interpretation of the Act by the Comptroller since 1927 has uniformly supported the position sought to be sustained by defendant, and his ruling as evidenced by the certificate in question also is entitled to weight, even though not binding upon the court." 234 F. Supp. 74, 79. The Comptroller's brief (p. 44) cites this finding, apparently with approval, but *nowhere* in the brief is the point discussed or any argument offered in its support.

Appellee believes the construction made by the Comptroller in this case to be absolutely *unique*. No administrative interpretation of the Act by *any* Comptroller of the Currency prior to the present Comptroller in the instant case has been cited, and appellee is unaware of any such interpretation made by any predecessor to the present Comptroller.[26]

Further, it should be noted that in addition to Utah, the states of Connecticut, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, South Dakota, and Washington all have statutes which restrict de novo branching in certain locations dependent upon whether there are existing banking offices at such locations but, nevertheless, permit state banks to acquire a branch by merger at such restricted locations. (See Appendix B). Subdivision (1) of Section 36(c) was passed 38 years ago in the McFadden Act of 1927. Surely if the Comptroller's decision in this case had been one of long administrative interpretation, national banks in the above-named states would have long since discovered this "good thing" by which they could establish de novo branches in instances where state law

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[26] Decisions of the Comptroller are not published. The appellee calls attention of this Court, however, to testimony before Congress of the prior Comptroller, Mr. Gidney, which would appear to run contrary to the construction given the statute by the present Comptroller. In urging an amendment to Section 36(b) of the National Bank Act relating to the retention of branches of a resulting national bank after merger, Comptroller Gidney was careful to point out that this proposed amendment did not conflict with "The purpose of existing law . . . to prevent a bank from acquiring branches where they could not be legally established under State law, by taking over other banks", Hearings before Senate Committee on Banking and Currency (Study of Banking Laws), 84th Cong., 2d Sess., p. 27 (1956), and *"would involve no possibility of permitting avoidance of State Branch banking laws or giving national banks competitive advantage over State banks in the matter of branching."* (Emphasis supplied). Hearings before House Committee on Banking and Currency (Financial Institutions Act of 1957), 85th Cong., 1st Sess., p. 160 (1957).

prohibits their competitor state banks from establishing such branches, and limits them only to acquisition of branches through merger!

Accordingly, whatever "weight" is to be ascribed to administrative construction in this case must be made on the basis of a *unique* construction of the present Comptroller to a statute passed 38 years ago, and, insofar as appellee has been enabled to ascertain, never made by any of his predecessors.

Appellee submits that no "weight" should be ascribed to this construction of the Comptroller even if it were a reasonable construction. It is admittedly not easy to distinguish between the two lines of cases, one of which holds that a "reasonable" interpretation of law by an administrator should be upheld, and the other in which the courts have substituted their own judgments for that of the administrator. Professor Davis, in his *Administrative Law Treatise*, makes no effort to reconcile these two lines of cases, and concludes that "the choice between substituted judgment and rational basis is largely for judicial discretion". Vol. 4, § 30.08, p. 233. See also, § 30.07. It would be possible, for example, to cite numerous decisions of the Supreme Court where it simply ignored the rational basis test and substituted its own interpretation of the law for that of the administrator. E.g., *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 (1944); *Office Employees* v. *NLRB*, 353 U.S. 313 (1957); *Railroad Retirement Bd.* v. *Duquesne Warehouse Co.*, 326 U.S. 446 (1946); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947).

There are certain principles, however, which do emerge from these cases which are of assistance in determining whether there should be judicial deference to an administrator's interpretation of law. One of them is set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944), cited by the Walker Bank court:

> "But the Administrator's policies are made in pursuance of official duty, based upon *more specialized experience* and *broader investigations* and information than is likely to come to a judge in a particular case." (Emphasis supplied).

There are certainly no "specialized experience" or "broader investigations" involved in the single question before this Court of the proper statutory construction of Section 36(c) of the National Bank Act in the light of its legislative history. This Court is just as expert and, indeed, undoubtedly more expert, in construing legislative language and history than is the Comptroller. It is in this very area of statutory construction on undisputed facts involving legislative history that one tends to find rather consistent substitution of judgment by courts for that of administrative agencies on matters of statutory construction. E.g., *Federal Trade Comm'n* v. *Anheuser-Busch*, 363 U.S. 536 (1960); *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958); *Cadwallader* v. *Sholl*, 89 U.S. App. D.C. 285, 196 F. 2d 14 (1951), *cert. denied*, 343 U.S. 966 (1952); *Ruth Elkhorn Coal, Inc.* v. *Mitchell*, 101 U.S. App. D.C. 313, 248 F.2d 635 (1957).

Furthermore, a study of the numerous cases where an interpretation of Section 36(c) and state branching laws by the Comptroller has been challenged shows that with but one possible exception, there has been no judicial deference to his interpretation as having any "weight". Thus, this Court rejected his interpretation of the New York branching statute based on an independent examination of the matter. *Union Savings Bank of Patchogue* v. *Saxon*, 118 U.S. App. D.C. 296, 335 F.2d 718 (1964). His construction of the Michigan branch law was rejected in both the *Wayne Oakland Bank*, and *Roseville* cases, *supra*. See, also, *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans and Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963) *rev'd on other grounds*, 379

U.S. 411 (1965), where his approval of a new branch charter was considered a violation of the Louisiana branch banking law.

Further, even in instances where the Comptroller's interpretation of Section 36(c) and State branch law has been upheld, it has been on the basis of independent judicial examination, not on the basis of any judicial deference to his opinion. *Suburban Trust Co.* v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963).

7. ***There is no basis in the "location" language of Section 36(c)(2) to permit a national bank to establish a de novo branch in Ogden prohibited to a state bank.***

Appellants argue that the provisions of the Utah statute are not covered by the "location" restriction in Section 36(c)(2). This argument, insofar as the appellee understands it, relates to the phrase "and subject to the restrictions as to location imposed by the law of the State on State banks" in subdivision (2) of Section 36(c) of the National Bank Act. Focusing upon the word "location", the argument runs that "location" restrictions mean "geographic" restrictions, and that any restriction in state branch law which cannot be described "geographically", e.g., by a mileage or a political unit description, is not applicable to national banks. Thus, a branch restriction, as in the Utah statute, prohibiting de novo branches at a location where there are existing banking offices, would be a "numbers" restriction rather than a "geographic" restriction, and thus, according to the argument, not applicable to national banks.

It might initially be noted that this argument is not supported by case law. Thus, in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830, the Court of Appeals

for the Sixth Circuit applied a provision of the Michigan statute, similar to that of the Utah statute here involved, in that it provided that "no branch shall be established in a city or village in which a State or National bank or branch thereof is then in operation". The court held that the Comptroller was prohibited by Section 36(c) of the National Bank Act, incorporating Michigan branch law, from issuing a certificate of authority to a national bank to establish a new branch in Troy, Michigan, after the establishment of a branch there by a State bank.[37]

In its essence the argument is an unwarranted play on words. It is just as reasonable to consider a provision in a state branch statute prohibiting a branch at a location where there are existing banking offices as a "restriction as to location" within the meaning of subdivision (2) of Section 36(c), as it is to consider a branch statute prohibiting a branch more than 100 miles away from the head office, or outside the county of the head office as a "restriction as to location". Both provisions specify a *location* at or in which branching is *restricted*.

Furthermore, there is nothing in the legislative history of the "location" language which supports the narrow construction urged. As noted at p. 29, *supra*, this language was added to the Bratton amendment at the request of Senator Blaine during the floor debates on the bill ultimately enacted as the Banking Act of 1933.

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[37] The National Bank of Detroit filed a petition for a writ of certiorari with the Supreme Court (October Term 1958, No. 216) contending at pp. 9-10 that Section 36(c) "encompasses only such restrictions as the State may impose as to geographic area or areas within which a State bank may establish branches", and that the 6th Circuit was in error in "incorporating further limitations by construing it to include those provisions of State law which prescribe the number of State banks permitted to operate in a given locality." Certiorari was denied at 358 U.S. 830.

There was no discussion of the Blaine amendment whatever. Surely, in view of the highly charged atmosphere, polarized about the issue of competitive equality in branching in which the debates took place, there would have been *some* discussion of a proposal as electric as the "location" argument now assumed was intended. There are now twenty-eight states which presently have restrictions of one type or another on the number of branches which may be operated under prescribed conditions.[38] It is simply inconsistent with the whole framework of the Congressional intent to establish competitive equality in the matter of branching in accordance with state law to assume, as does the "location" argument, that Congress intended to permit national banks to establish branches in all of these states at locations forbidden to state banks by state law by reason of the existing banking offices at such locations.

It is, therefore, apparent that the "restrictions as to location" language carries with it none of the restrictive implications urged. The intent of the language was obviously nothing more than to assure that the standards in state law to be applied to national banks were easily ascertainable objective standards, reduceible to designating where a branch may or may not be established. Thus the usual standard in a state branch banking statute of a finding by a state bank Supervisor of a "public need" for a branch involving as it does, a *judgment* evaluation of facts, was obviously not the easily ascertainable objective type of "restriction" which Congress intended to be applicable to national banks.[39] Nor are judgment evalua-

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[38] These include, in addition to Utah-Alabama, Arkansas, Connecticut, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Washington and Wisconsin.

tions reflected in a state statute or administrative judgment.[46]

This construction of the "restrictions as to location" language is consistent with the theme of competitive equality pervading the legislative history. It also preserves the duality of the dual banking system by assuring independent judgment on discretionary matters by the Comptroller alone without regard to state law.

8. *The "anti-trust" argument advanced by appellants is totally lacking in merit.*

It is difficult to follow appellants' "anti-trust" argument. (Brief of Comptroller, pp. 49-50; brief of First Security, pp. 17-18). As appellee understands it, the argument is that the provision in the Utah statute prohibiting branching in cities of the second class where there is already a banking facility, except by take-over of such a facility, is inapplicable to national banks because it violates public policy embraced in anti-trust statutes. Appellants would then appear to conclude that national banks are permitted unlimited de novo branching at locations where state law prohibits all branching except by means of a take-over.

Such an argument requires a strained intellectual leap from premise to conclusion, to say the least. In any event, it makes absolute shambles out of the "policy of equalization" in branching established by Congress. The only way in which appellees can construe the argument is as a frontal attack on the branching laws of the 15 states which prohibit *all* branch banking (Appendix A); of the 13 states (including Utah) which restrict de novo branch banking in certain locations dependent upon whether

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[46] *Ruhton ex rel State Banking Comm'n* v. *Michigan Nat'l Bank*, 298 Mich. 417, 299 N.W. 129 (1941).

[46] *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964).

there are existing banking offices at such locations, but nevertheless permit state banks to acquire a branch by merger at such restricted locations (Appendix B); and, indeed, of the 13 states which restrict branch banking in some other form (Appendix A). This casual invalidation of the principle of "competitive equality" in the matter of branching in 41 states of the Union on the basis of generalized references to anti-trust laws is so completely lacking in merit as not to warrant further discussion.

II. Appellee has standing to maintain this action

The issue of the standing of a competitor bank to seek to enjoin the Comptroller of the Currency from issuing a certificate of authority to a national bank to establish a branch contrary to the provisions of Section 36(c) of the National Bank Act has already been decided by this Court. At 108 App. D.C. 37, 278 F. 2d 871 (1960), this Court affirmed the decision of Judge Youngdahl in *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), where, at p. 780, he held that a state bank had standing to seek judicial relief in order to prevent the establishment of an unlawful branch of a national bank, citing the decision and reasoning of *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir. 1958), *cert. denied* 358 U.S. 830.

Appellant First Security recognizes that *Gidney* is *stare decisis* to the instant case, and, therefore, asks reversal of *Gidney*. (First Security's Brief, p. 18) The Comptroller, however, argues the inapplicability of Gidney to the instant case on the grounds that *Gidney* involved an "outside" branch, where as the instant case involves an "inside" branch. (Comptroller's Brief, pp. 53, 54) Just how the fact that a competitor bank challenging an unlawful "outside" branch has sufficient standing to seek to enjoin the authorization of such a branch, but a competitor bank challenging an unlawful "inside"

branch lacks such standing, is not explained by the Comptroller. There is, obviously, no difference and, therefore, appellant's arguments fall under *Gidney*.

In any event, the same cases relied upon by the Comptroller in challenging appellee's standing to sue, and by First Security in contending that this Court's affirmation of *Gidney* was erroneous, were the subject of exhaustive treatment by this Court in *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 116 U.S. App. D.C. 285, 323 F. 2d 290 (1963), *rev'd. on other grounds*, 379 U.S. 411 (1965). In that case, as here, the Comptroller challenged the standing of a state bank to challenge the issuance of a certificate of authority by the Comptroller to establish a new bank which the state bank claimed was, in reality, an unlawful branch. He cited the same argument, as here, to the effect that economic disadvantage is insufficient to establish standing and cited the same cases now offered to this Court. This Court, after lengthy consideration and discussion of the Comptroller's argument and citations, at 323 F. 2d 290, 297-300, rejected the Comptroller's position and concluded that

> "... where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."

Appellee herewith relies upon, and adopts, the reasoning of this Court in the *Whitney* case.

By 1964 this point was apparently clearly *stare decisis* in this circuit for in *Union Savings Bank of Patchogue* v. *Saxon*, 118 U.S. App. D.C. 296, 335 F. 2d 718 (1964) the Court sustained the challenge of a state bank to the validity of a certificate of authority issued by the Comptroller permitting the establishment of a national bank

branch without even discussing the question of the standing of the state bank to bring the suit. In view of the *Whitney* holding that standing is jurisdictional, 323 F. 2d 290, 298, *Patchogue* constitutes an additional holding that a state bank has standing to challenge the establishment of an unlawful branch of a national bank.[41]

CONCLUSION

Congress, in furtherance of its policy of equalization, has provided that national banks may establish a branch banking office within a state only if a state bank would be allowed to establish a branch banking office under the same conditions. Under the statute law of the state of Utah, a state bank would be prevented from establishing a branch bank as proposed by First Security Bank of Utah. Accordingly, approval by the Comptroller of such a proposed bank would be illegal and properly was found to be so by the district court.

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[41] The Comptroller has not cited (and could not cite) a single case wherein any court has sustained his argument that a state bank lacks standing to challenge the unlawful approval of a national bank branch. The law in other jurisdictions is, in fact, that of *Gidney* and *Whitney*. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied* 358 U.S. 830; *Suburban Trust Co.* v. *National Bank of Westfield*, 211 F. Supp. 694 (D. N.J. 1962); *First Nat'l Bank of Smithfield* v. *First Nat'l Bank of Eastern North Carolina*, 232 F. Supp. 725 (E.D. N.C. 1964); *Farris* v. *Indian Hills Nat'l Bank*, No. 02146, October 23, 1964; *cf. Traverse City State Bank* v. *Empire National Bank*, 228 F. Supp. 984 (W.D. Mich. 1964); *Bank of Dearborn* v. *Saxon*, No. 23628, July 12, 1965 (E.D. Mich.).

Appellee requests this Court to affirm the decision of the district court.

Respectfully submitted,

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APPENDIX A

Summary of Branch Banking Statutes Of The 50 States

States Permitting Unlimited Branch Banking

State:

Alaska
Alaska Statutes, 1962, Sec. 06.05.415.

Arizona
Arizona Revised Stat. Anno., Sec. 6-223 (1956).

California
Calif. Financial Code Anno., Sec. 500 (1955).

Delaware
2 Del. Code Anno., Title 5, Sec. 770 (Supp. 1962).

Idaho
Idaho Code, Sec. 26-1001 (Supp. 1963).

Maryland
Anno. Code of Md. 1957, Art. 11, Sec. 65.

Nevada
Nevada Revised Stat., Sec. 660.010 (1960).

North Carolina
Gen. Stat. of N. C., Sec. 53-62 (Supp. 1963).

Rhode Island
Gen. Laws of R.I., Sec. 19-1-13 (1956).

South Carolina
Code of Laws of S. C., Sec. 8-57 (1962).

Vermont
Vermont Stat. Anno., Title 8, Sec. 501 (1958).

States Permitting Restrictive Branch Banking

State:

Alabama
Acts of 1953, 1955, 1957; Code of Alabama, Title 5, Sec. 125(1).

Connecticut

Gen. Stat. of Conn., Revision of 1958, Sec. 36-59.

Georgia

Code of Ga. Anno., Sec. 13-203.1.

Hawaii

Revised Laws of Hawaii, C. 178, Sec. 39.

Indiana

5 Burns Ind. Stat. Anno., Sec. 18-1707.

Kentucky

Ky. Revised Stat., Sec. 287.180.

Louisiana

La. Revised Stat., Sec. 6:54 (1951).

Maine

Revised Stat. of Maine, Ch. 59, Sec. 19-C (1963 Supp.); Ch. 59, Sec. 124 (1963 Supp.)

Massachusetts

Mass. Gen. Laws Anno., Ch. 172, Sec. 11 (1963 Supp.); Ch. 172 A, Sec. 12.

Michigan

Mich. Stat. Anno., Secs. 23.762, 23.762(1).

Mississippi

Miss. Code, Secs. 5228, 5229.

New Hampshire

N.H. Rev. Stat. Anno., Sec. 384-B:2 (1963 Supp.).

New Jersey

N.J. Stat. Anno., Sec. 17:9A-19.

New Mexico

N.M. Stat. Anno., Sec. 48-2-17.

New York

Book 4, Banking Law, Sec. 105.

Ohio

Page's Ohio Revised Code Anno., Title 11, Sec. 1103.09.

Oregon

Oregon Rev. Stat., Sec. 714.050.

Pennsylvania

Purdon's Pa. Stat. Anno., Title 7, Sec. 819-204.1.

South Dakota

S.D. Code of 1939, Sec. 6.0402.

Tennessee

Tenn. Code Anno., Sec. 45-211.

Utah

Utah Code Anno., Sec. 7-3-6 (Supp. 1963).

Virginia

Code of Va., Title 6, Art. 3, Sec. 6-26.

Washington

Revised Code of Wash. Anno., Sec. 30.40.020 (1961).

States Prohibiting All Branch Banking

States:

Arkansas *

Ark. Stat. 1947 Anno., 1963 Supp., Sec. 67:205; Sec. 67-340-342.

Colorado

Colo. Revised Stat., 1960 Perm. Supp., Sec. 14-13-1.

Florida

Fla. Stat. Anno., Sec. 659.06.

Illinois

Smith-Hurd Ill. Anno. Stat., Ch. 16½, Sec. 106.

Iowa *

Ia. Code Anno., Sec. 528.51.

Kansas *

Gen. Stat. of Kansas Anno., Sec. 9-1111 (1961 Supp.).

Minnesota

Min. Stat. Anno., Sec. 48-34.

Missouri *

Vernon's Anno., Mo. Stat., Sec. 362.105, Sec. 362.107.

Montana *

Revised Codes of Mont. Anno., Sec. 5-1028 (1963 Supp.).

Nebraska *

Revised Stat. of Neb., Sec. 8-1, 105.

North Dakota *

N. D. Revised Code, Sec. 6-03-14.

Oklahoma *

Okla. Stat. Anno., Title 6, Ch. 19, Sec. 461 (1963 Supp.).

Texas

Vernon's Civil Stat. of Texas Anno., Art. 342-903.

West Virginia

W. Va. Code Anno., Sec. 3131.

Wisconsin *

West's Wisc. Stat. Anno., Sec. 221.04.

States With No Legislation Authorizing Branch Banking

States:

Wyoming

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* These states permit certain offices with limited powers only. Arkansas permits a branch under one very limited circumstance.

APPENDIX B

Summary Of State Laws Which, Like the Utah Statute Involved In This Case:

(1) *Restrict De Novo Branch Banking in Certain Locations Dependent Upon Whether There Are Existing Banking Offices At Such Locations, But*

(2) *Nevertheless Permit State Banks To Acquire A Branch By Merger At Such Restricted Locations*

State:

Connecticut
Gen. Stat. Stat. of Conn., Revision of 1958, Title 36, Sec. 59

Kentucky
Ky. Revised Stat., Vol. II, Sec. 287.80

Maine
Revised State. of Maine, Ch. 59, Sec. 19-C (1963 Supp.); Ch. 59, Sec. 124 (1963 Supp.)

Massachusetts
Mass. Gen. Laws Anno. Ch. 172, Sec. 11

Mississippi
Miss. Code, Sec. 5228, 5229, 5232

New Hampshire
N.H. Rev. Stats. Anno., Ch. 384 B:2 (1963)

New Jersey
N.J. Stat. Anno., Sec. 17:9A-19

New York
Book 4, McKinney's Consol. Laws of New York Anno., Sec. 105, Sec. 600, Sec. 601-a

Oregon
Oregon Rev. Stat., Sec. 714.054

Pennsylvania
Purdon's Pa. Stat. Anno., Title 7, Sec. 819.204.1

South Dakota

S.D. Code of 1939 (1960 Supp.), Sec., 6.0402

Washington

Revised Code of Wash., Sec. 30.40.020

Note 1: Virginia, Code of Va., Title 6, Sec. 6-26, restricts branching to intra-city without the number-of-banks restriction. It permits branching outside of the city by merger.

Note 2: Appellee has found it difficult to trace each of the foregoing statutes to the original enactment date of the provisions embodying *both* of the provisions set forth in the caption to this Appendix. It sets forth here, however, the earliest date which it was able to find with the belief that in certain instances the origin dates are earlier than those listed: Connecticut (1947); Kentucky (1954); Maine (1961); Massachusetts (1928); Mississippi (1934); New Hampshire (1963); New Jersey (1948); New York (1961); Oregon (1963); Pennsylvania (1955); South Dakota (1933); Washington (1933); Virginia (1962).

Note 3: The present provisions of the Utah statute were basically enacted on March 7, 1951. Prior to that time the provisions of the Utah Code Anno. (1943), Sec. 7-3-6, authorized branches in cities other than the first class upon obtaining consent of all banks located therein. For further legislative history of the Utah statute, see *Walker Bank & Trust Co.* v. *Taylor*, 15 U.2d 234, 236-7, 390 P.2d 592, 594-5 (1964).